122-116

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 275.

THOMAS W. BARTRAM AND JOSEPH B. BARTRAM,
PLAINTIFFS IN ERROR,

vs.

WILLIAM H. ROBERTSON, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED AUGUST 6, 1884.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you or some of you, between Thomas W. Bartram and Joseph B. Bartram, plaintiffs, and William H. Robertson, defendant, a manifest error hath happened, to the great damage of the said Thomas W. Bartram and Joseph B. Bartram, as is said and as appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 11th day of January, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and eighth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.
Jan'y 11, 1884.

WM. J. WALLACE

2 UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to fifty-four, inclusive, contain a true and complete transcript of the records and proceeding had in said court in the case of Thomas W. Bartram and Joseph B. Bartram, plaintiffs in error, against William H. Robertson, defendant in error, as the same remain of record on the file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern dis-

trict of New York, in the second circuit, this twenty-fourth day of May, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and eight.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH, *Clerk.*

[Endorsed:] U. S. Supreme Court. 7996. Thomas W. Bartram & ano., pl'tiffs in error, against William H. Robertson, def't in error. Writ of error. Dunning, Edsall, Hart & Fowler, att'ys for pl'tiffs in error, 67 Wall St., N. Y.

[Stamped:] U. S. circuit court, Jan. 12, 1884. Timothy Griffith, clerk.

Service of a copy of the within writ of error is hereby admitted. New York, Jan'y 12, 1884.

ELIHU ROOT,
U. S. Attorney, Attorney for Defendant in Error.

3 *Summons.*

New York Supreme Court, County of New York.

THOMAS W. BARTRAM and JOSEPH B. BARTRAM, Plaintiffs,
against,
WILLIAM H. ROBERTSON, Defendant.

Trial desired in the county of New York.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiffs' attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, June 12th, 1882.

DUNNING, EDSALL,
HART & FOWLER,
Plaintiffs' Attorneys.

Post-office address and office: No. 67 Wall street, New York city.

(Endorsed:) Supreme court. Thos. W. Bartram & ano. *vs.* W. H. Robertson. Received Jun. 17, 188–. Attorney's office. To William H. Robertson, Esq., collector custom-house N. Y. Served June 13, '82. R.

4 The President of the United States of America to the judges of the supreme court of the State of New York, Greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commencing before

you against William H. Robertson, defendant, by Thomas W. Bartram & ano., plaintiffs, do therefore command you that the record and proceedings in said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 30th day of June, 1882, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Morrison R. Waite, Esquire, Chief Justice of the Supreme Court of the United States, the 27th day of June, in the year one thousand eight hundred and eighty-two.

[L. S.] JOSEPH M. DEUEL, *Clerk.*

STEWART L. WOODFORD,
United States Attorney, Attorney for Defendant.

5 (Endorsed:) U. S. circuit —. Thomas W. Bartram & ano. *vs.* William H. Robertson. Copy [of] certiorari. Stewart L. Woodford, U. S. attorney, attorney for defendant.

Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York.

New York, June 27, 1882.

Yours, STEWART L. WOODFORD,
U. S. Attorney, Attorney for Defendant.

To Dunning, E., H. & F., plaintiffs' attorneys.

Due service of a copy of the within and of the above notice is hereby admitted.

New York, June 27, 1882.

DUNNING, EDSALL,
HART & FOWLER,
Plaintiffs' Attorneys.

6 *Bill of Particulars of the Plaintiffs' Claims Herein.*

U. S. Circuit Court, Southern District of New York.

THOMAS W. BARTRAM & ANO. *against* WILLIAM H. ROBERTSON.

First cause of action.

Name of importers, Bartram Brothers.
Description of the merchandise, to wit:
Two hundred and two hogsheads of sugar, marked—

31	hhds.	M P + P.	30	hhds.	◇H◇.	21	hhds.	M V.
20	"	W D.	14	"	G G.	14	"	B B.
11	"	M. B.	10	"	B G.	10	"	L L.
9	"	W.	9	"	L L G.	8	"	S H.
5	"	L G.	5	"	G P.	3	"	U L.
		H						
2	"	W F.						

And seventeen barrels of sugar, marked C H, and sixty-three casks of molasses, marked 52 casks V ⟨R⟩ J (St. Croix.); 11 casks ⟨A⟩ (St. Croix.), imported from St. Croix, W. I., per "Mary Bartlett," C. H. Welch, master.

Invoice dated February 28, 1882.

Also one hundred and twenty-seven hogsheads of sugar, marked—

T

27 hhds. L P. 24 hhds. M S. 22 hhds. S H.
18 hhds. St. J. 11 hhds. J F. 11 hhds. T. C. K.
7 8 hhds. B S. 6 hhds. S F.

And fifty-two barrels of sugar, marked—

32 bbls. M P. 16 bbls. S F. 4 bbls. M S.

And forty-two casks molasses, marked—

22 casks V⟨R⟩J. 20 casks St. C. F. S.

Imported from St. Croix per "Mary Bartlett," C. H. Welch, master.

Invoice dated February 25, 1882.

Date of entry of above merchandise at the custom-house, March 21, 1882.

The precise amount of duty claimed to have been exacted in excess, $15,389.26.

The date of payment of said duties (liquidation), April 8, 1882.

The day and year on which protests were filed against the exaction thereof:

March 21, 1882, on entry of above merchandise.

March 30, 1882, on withdrawal of above molasses.

March 31, 1882, on withdrawal of above sugar.

April 14, 1882, after liquidation of the entry.

The date of appeal thereon to the Secretary of the Treasury, April 14, 1882.

The date of decision on such appeal, May 15, 1882.

Second cause of action.

Name of importers, Bartram Brothers.

8 Description of merchandise, to wit:

Ninety-two hogsheads of sugar, marked—

14	hhds.	M V.	12	hhds.	R.	11	hhds.	W F.
10	"	O G.	6	"	LLG.	5	"	L B.
5	"	G P.	4	"	G G.	4	"	S H.
3	"	C.	2	"	U L.	2	"	H P.

And one hundred and twelve barrels of sugar marked—

65	bbls.	MP+P.	15	bbls.	⟨H⟩.	10	bbls.	HP.
8	"	OG.	5	"	AV.	4	"	⊕.
3	"	GP.	2	"	MS.			

And fifty casks molasses marked—

42 casks V R J. St. Croix. 8 casks A St. Croix.

Imported from St. Croix, W. I., per ship or vessel "Charles A. Hoard," A. J. Blackwood, master.

Date of invoice, March 15, 1882.

Date of entry at custom-house, April 3, 1882.

Precise amount of duty claimed to have been exacted in excess, $5,236.84.

Date of payment of said duties (liquidation), May 13, 1882.

Day and year on which protests were filed against the exaction thereof, April 3, 1882, on entry of above merchandise:

April 17, 1882, on withdrawal of above molasses.

9 April 18, 1882, on withdrawal of above sugars.

April 16, 1882, after liquidation of above entry.

Date of appeal thereon to the Secretary of the Treasury, May 17, 1882.

Date of decision on such appeal, May 26, 1882.

Third cause of action.

Name of importers, Bartram Brothers.

Description of merchandise: One hundred and twenty hogsheads of sugar, marked—

21 hhds. W. T. W.	20 hhds. E G.	20 hhds. WD.
19 " GH.	17 " H.	14 " LR.
9 " MS.		

Imported from St. Croix, W. I., per ship or vessel "Charles A. Hoard," A. J. Blackwood, master.

Date of invoice March 15, 1882.

Date of entry at custom-house, April 18, 1882.

Precise amount of duty claimed to have been exacted in excess, $5,808.34.

Date of payment of said duties (liquidation), May 13, 1882.

10 Day and year on which protests were filed against the exaction thereof:

April 18, 1882, on entry of above merchandise.

May 17, 1882, after liquidation of above entry.

Date of appeal thereon to Secretary of Treasury, May 17, 1882.

Date of decision on such appeal, May 26, 1882.

Fourth cause of action.

Name of importers, Bartram Brothers.

Description of merchandise: Ninety-five hogsheads of sugar, marked—

32 hhds. T C K. J	25 hhds. L P.	12 hhds. St. J.
9 " S H.	9 " B S.	9 " M S.

Imported from St. Croix, W. I., per brigantine "Water Lily," Charles Perry, master.

Invoice dated March 24, 1882.

Also forty hogsheads of sugar, marked—

9 hhds. C H. 8 hhds. B B. 8 hhds ⟨H⟩.

8 " M P + P. 6 " L L. 1 " O G.

And thirty-three barrels of sugar, marked—

21 bbls. G G N B. 12 bbls. C H.

Imported from St. Croix, W. I., per brigantine "Water Lily," Charles Perry, master.

Invoice dated March 25, 1882.

11 Date of entry of above merchandise, April 20, 1882.

Precise amount of duty claimed to have been exacted in excess, $6,129.19.

Date of payment of said duties (liquidation), May 10, 1882.

Day and year on which protests were filed against the exaction thereof:

April 20, 1882, on entry of above merchandise.

May 5, 1882, on withdrawal of same.

May 17, 1882, after liquidation of above entry.

Date of appeal thereon to Secretary of Treasury, May 17, 1882.

Date of decision on such appeal, May 26, 1882.

Fifth cause of action.

Name of importers, Bartram Brothers.

Description of merchandise, eighty-six casks of molasses, marked—

8 casks ⟨A⟩. 78 casks V ⟨R⟩ J.
St. Croix. St. Croix.

Imported from St. Croix, W. I., per brigantine "Water Lilly," Charles Perry, master.

Date of invoice, March 25, 1882.

12 Date of entry at custom-house, April 20, 1882.

Precise amount of duty claimed to have been exacted in excess, $658.94.

Date of payment of said duties (liquidation), May 13, 1882.

Day and year on which protests were filed against the exaction thereof:

April 20, 1882, on entry and withdrawal of above merchandise.

May 17, 1882, after liquidation of above entry.

Date of appeal thereon to Secretary of the Treasury, May 17, 1882.

Date of decision on such appeal, May 26, 1882.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Thomas W. Bartram, being duly sworn, says that he is one of the plaintiffs in the above-entitled action, and that the foregoing bill of particulars is true to the best of his knowledge, information, and belief.

THOMAS W. BARTRAM.

Sworn to before me this 18th day of July, 1882.
W. F. DUNNING,
Notary Public, N. Y. Co.

13 (Endorsed:) U. S. circuit court, southern district of New York. Thomas W. Bartram & ano. ag'st William H. Robertson. Copy [of] plaintiff's bill particulars. Dunning, Edsall, Hart & Fowler, attorneys for plaintiffs; office & P. O. address, 67 Wall St., N. Y. city. Received [at] U. S. attorney's office July 19, 1882. To Stewart L. Woodford, Esq., att'y for defendant.

14 In United States Circuit Court, Southern District of New York.

THOMAS W. BARTRAM and JOSEPH B. BARTRAM, Plaintiffs,
against
WILLIAM H. ROBERTSON, Defendant. } No. 7996.

(By removal from New York supreme court.)

The plaintiffs above named, by Dunning, Edsall, Hart & Fowler, their attorneys herein, for their amended complaint respectfully show to this honorable court as follows:

I. For a First Cause of Action.

First. That at all times during the year 1882 the plaintiffs have been and they still are copartners doing business in New York under the firm name and style of "Bartram Brothers," and during the same time the defendant was and he still is collector of the port of New York.

Second. That during the same times the Island of St. Croix was and it still is a West India colony of and a part of the dominions of his majesty the King of Denmark; between whom and the United States of America there then existed and still exists a treaty, duly ratified and proclaimed, and to carry which into operation
15 the necessary laws were passed by Congress, and whereby it is, among other things, provided that "no higher or other duties shall be imposed on the importation into the United States of any article the produce or manufacture of the dominions of his majesty the King of Denmark than are or shall be payable on the like articles being the produce or manufacture of any other country."

Third. That during the same times there was and there still is another foreign country, known as the Hawaiian Islands, constituting the dominions of his majesty the King of the Hawaiian Islands, between whom and the United States of America there then existed and still exists a treaty, which was duly ratified and proclaimed, and to carry which into effect an act of Congress was passed on the 15th day of August, 1876, and whereby the United States agrees to admit, and pursuant to which the United States has admitted and still does admit, into all the ports of the United States muscovado, brown, and other unrefined sugar and syrups of sugar-cane, melado,

and molasses, being the produce and manufacture of the said Hawaiian Islands, free of duty.

Fourth. That heretofore, to wit, on or about the 21st day of March, 1882, the plaintiffs imported at the port of New York from the said Island of St. Croix, per the ship or vessel "Mary Bartlett," certain brown and unrefined sugars and molasses, which were the produce and manufacture of said island, to wit: Two hundred and two hogsheads and seventeen barrels of sugar and sixty-three casks of
16 molasses, and one hundred and twenty-seven hogsheads and fifty-two barrels of sugar, and forty-two casks of molasses, as per the invoices thereof; all of which said sugars and molasses were like articles to the sugars and molasses produced and manufactured in the Hawaiian Islands, which so have been and are admitted to the ports of the United States free of duty under and pursuant to said treaty with that country and said act to carry same into effect, and the same were of such kinds or grades that if they had been produced or manufactured in the Hawaiian Islands instead of in St. Croix they would have been entitled to be and would have been admitted to the ports of the United States free of duty under said Hawaiian treaty and act of Congress.

Fifth. That on the date last mentioned the plaintiffs duly entered all of said sugars and molasses at the custom-house at said port and duly made their claim to the defendant, as collector of said port, that the same, being Danish products, were entitled to be and should be admitted by him free of duty, under and by virtue of said treaty with Denmark, because like articles, the produce and manufacture of the Hawaiian Islands, were, under and pursuant to the said treaty with that country and said act, admitted free of duty, and plaintiffs duly and specifically objected and protested to said defendant in writing against the imposition by him of any duties on their said sugars and molasses so entered for the reason aforesaid.

17 Sixth. That despite the claim and against the protest of these plaintiffs, as aforesaid, the defendant treated said sugars and molasses as dutiable articles, and proceeded to and did ascertain, liquidate, and impose duties thereon at the rates of duty provided by the act of July 14, 1870, as amended by the act of December 22, 1870, and by the act of March 3, 1875, amounting to $15,389.26, in gold; and these plaintiffs, in order to obtain possession of their said sugar and molasses, had to and did pay the said amount of duties to the defendant, but only under a further due and sufficient protest in writing, wherein they notified the defendant on said entry of their dissatisfaction with his action and decision, setting forth distinctly and specifically, among the grounds thereof, that their said sugars and molasses, being Danish products as aforesaid, were entitled to be admitted free of duty by virtue of said Danish treaty, for the reason that under said Hawaiian treaty and act like articles of Hawaiian produce and manufacture were admitted free.

Seventh. That thereafter, within the time prescribed by law, the plaintiffs duly appealed from said action and decision of the defendant to the Secretary of the Treasury, who made his decision affirm-

ing and approving said action and decision of the defendant in the premises; whereupon plaintiffs in due time brought this action to recover back the duties so imposed by and paid to the defendant.

18 *II. For a Second Cause of Action.*

First. The allegations contained in the first, second, and third subdivisions of the foregoing first cause of action are true, and the plaintiffs hereby repeat the same as a part hereof, and further show—

Second. That heretofore, to wit, on or about the 3rd day of April, 1882, the plaintiffs imported, at the port of New York, from the said Island of St. Croix, per the ship or vessel "Charles A. Hoard," certain brown and unrefined sugars and molasses, which were the produce and manufacture of said island, to wit, ninety-two hogsheads and one hundred and twelve barrels of sugar and fifty casks of molasses, marked as per invoice thereof, all of which said sugars and molasses were like articles to the sugars and molasses produced and manufactured in the Hawaiian Islands, which so have been and are admitted to the ports of the United States free of duty under and pursuant to said treaty with that country and said act to carry same into effect, and the same were of such kinds or grades that if they had been produced or manufactured in the Hawaiian Islands instead of in St. Croix they would have been entitled to be and would have been admitted to the ports of the United States free of duty under said Hawaiian treaty and said act of Congress.

Third. That on the date last mentioned the plaintiffs duly entered all of said sugars and molasses at the custom-house at said port, and duly made their claim to the defendant, as collector of said potr,

19 that the same, being Danish products, were entitled to be and should be admitted by him free of duty under and by virtue of said treaty with Denmark, because like articles the produce and manufacture of the Hawaiian Islands were, under and pursuant to the said treaty with that country and said act, admitted free of duty, and plaintiffs duly and specifically objected and protested to said defendant, in writing, against the imposition by him of any duties on their said sugars and molasses so entered for the reasons aforesaid.

Fourth. That despite the claim and against the protest of these plaintiffs, as aforesaid, the defendant treated said sugars and molasses as dutiable articles and proceeded to and did ascertain, liquidate, and impose duties thereon at the rates of duty provided by the act of July 14, 1870, as amended by the act of December 22, 1870, and by the act of March 3, 1875, amounting to $5,236.84, in gold; and these plaintiffs, in order to obtain possession of their said sugars and molasses, had to and did pay the said amount of duties to the defendant, but only under a further due and sufficient protest, in writing, wherein they notified the defendant on said entry of their dissatisfaction with his action and decision, setting forth distinctly and specifically, among the grounds thereof, that their said sugars and molasses, being Danish products as aforesaid, were entitled to be admitted free of duty by virtue of said Danish treaty, for the reason

that under said Hawaiian treaty and act like articles of Hawaiian produce and manufacture were admitted free.

Fifth. That thereafter, within the time prescribed by law, the plaintiffs duly appealed from said action and decision of the defendant to the Secretary of the Treasury, who made his decision affirming and approving said action and decision of the defendant in the premises; whereupon plaintiffs in due time brought this action to recover back the duties so imposed by and paid to the defendant.

III. For a Third Cause of Action.

First. The allegations contained in the first, second, and third subdivisions of the foregoing first cause of action are true, and the plaintiffs hereby repeat the same as a part hereof, and further show—

Second. That heretofore, to wit, on or about the 18th day of April, 1882, the plaintiffs imported to the port of New York from the Island of St. Croix, per the ship or vessel "Charles A. Hoard," certain brown and unrefined sugars, which were the produce and manufacture of said island, to wit, 120 hogsheads of sugar marked as per invoice thereof, all of which said sugars were like articles to the sugars produced and manufactured in the Hawaiian Islands, which so have been and are admitted to the ports of the United States free of duty under and pursuant to said treaty with that country and said act to carry [the] same into effect, and the same were of such kinds or grades that if they had been produced or manufactured in the Hawaiian Islands instead of St. Croix they would have been entitled to be and would have been admitted to the ports of the United States free of duty under said Hawaiian treaty and said act of Congress.

Third. That on the date last mentioned the plaintiffs duly entered all of said sugars at the custom-house at said port, and duly made their claim to the defendant, as collector of said port, that the same, being Danish products, were entitled to be and should be admitted by him free of duty under and by virtue of said treaty with Denmark, because like articles the produce and manufacture of the Hawaiian Islands were, under and pursuant to the said treaty with that country and said act, admitted free of duty, and plaintiffs duly and specifically objected and protested to said defendant, in writing, against the imposition by him of any duties on their said sugars so entered for the reason aforesaid.

Fourth. That despite the claim and against the protest of these plaintiffs, as aforesaid, the defendant treated said sugars as dutiable articles, and proceeded to and did ascertain, liquidate, and impose duties thereon at the rates of duty provided by the act of July 14, 1870, as amended by the act of December, 22, 1870, and by the act of March 3, 1875, amounting to $5,808.34, in gold; and these plaintiffs, in order to obtain possession of their said sugars had to and did pay the said amount of duties to the defendant, but only under a further due and sufficient protest, in writing, wherein they notified the defendant on said entry of their dissatisfaction with his action and decision, setting forth distinctly and specifically, among the grounds thereof, that their said sugars, being

Danish products as aforesaid, were entitled to be admitted free of duty by virtue of said Danish treaty, for the reason that under said Hawaiian treaty and act like articles of Hawaiian produce and manufacture were admitted free.

Fifth. That thereafter, within the time prescribed by law, the plaintiffs duly appealed from said action and decision of the defendant to the Secretary of the Treasury, who made his decision affirming and approving said action and decision of the defendant in the premises; whereupon plaintiffs in due time brought this action to recover back the duties so imposed by and paid to the defendant.

IV. For a Fourth Cause of Action.

First. The allegations contained in the first, second, and third subdivisions of the foregoing first cause of action are true, and the plaintiffs hereby repeat the same as a part hereof, and further show—

Second. That theretofore, to wit, on or about the 20th day of April, 1882, the plaintiffs imported at the port of New York from the Island of St. Croix, per the ship or vessel "Water Lily," certain brown and unrefined sugars, which were the produce and manufacture of said island, to wit, ninety-five hogsheads and forty hogsheads and thirty barrels of sugar, marked as per invoice thereof, all of
23 which said sugars were like articles to the sugars produced and manufactured in the Hawaiian Islands, which so have been and are admitted to the ports of the United States free of duty under and pursuant to said treaty with that country and said act to carry same into effect, and the same were of such kinds or grades that, if they had been produced or manufactured in the Hawaiian Islands instead of in St. Croix, they would have been entitled to be and would have been admitted to the ports of the United States free of duty under said Hawaiian treaty and said act of Congress.

Third. That on the date last mentioned the plaintiffs duly entered all of said sugars at the custom-house at said port, and duly made their claim to the defendant, as collector of said port, that the same, being Danish products, were entitled to be and should be admitted by him free of duty under and by virtue of said treaty with Denmark, because like articles the produce and manufacture of the Hawaiian Islands were, under and pursuant to the said treaty with that country and said act, admitted free of duty, and plaintiffs duly and specifically objected and protested to said defendant, in writing, against the imposition by him of any duties on their said sugars so entered for the reasons aforesaid.

Fourth. That despite the claim and against the protest of these plaintiffs, as aforesaid, the defendant treated said sugars as dutiable articles, and proceeded to and did ascertain, liquidate, and
24 impose duties thereon at the rates of duty provided by the act of July 14, 1870, as amended by the act of December 22, 1870, and by the act of March 3, 1875, amounting to $6,129.19, in gold; and these plaintiffs, in order to obtain possession of their said sugars, had to and did pay the said amount of duties to the defendant, but only under a further due and sufficient protest, in writing, wherein they notified the defendant on said entry of their dissatis-

faction with his actions and decision, setting forth distinctly and specifically, among the grounds thereof, that their said sugars, being Danish products as aforesaid, were entitled to be admitted free of duty by virtue of said Danish treaty for the reason that under said Hawaiian treaty and act like articles of Hawaiian produce and manufacture were admitted free.

Fifth. That thereafter, within the time prescribed by law, the plaintiffs duly appealed from said action and decision of the defendant to the Secretary of the Treasury, who made his decision affirming and approving said action and decision of the defendant in the premises; whereupon plaintiffs in due time brought this action to recover back the duties so imposed by and paid to the defendant.

V. For a Fifth Cause of Action.

First. The allegations contained in the first, second, and third subdivisions of the foregoing first cause of action are true, and the plaintiffs hereby repeat the same as a part thereof, and further show—

25 Second. That heretofore, to wit, on or about the 20th day of April, 1882, the plaintiffs imported at the port of New York from said Island of St. Croix, per the ship or vessel "Water Lily," certain molasses, which was the produce and manufacture of said Island, to wit, 86 casks of molasses, marked as per invoice thereof; all of which said molasses were like articles to the molasses produced and manufactured in the Hawaiian Islands, which so have been and are admitted to the ports of the United States free of duty under and pursuant to said treaty with that country and said act to carry same into effect, and the same were of such kinds or grades that if they had been produced or manufactured in the Hawaiian Island instead of in St. Croix they would have been entitled to be and would have been admitted to the ports of the United States free of duty under said Hawaiian treaty and said act of Congress.

Third. That on the date last mentioned the plaintiffs duly entered all of said molasses at the custom-house at said port and duly made their claim to the defendant, as collector of said port, that the same, being Danish products, were entitled to be and should be admitted by him free of duty under and by virtue of said treaty with Denmark, because like articles, the produce and manufacture of the Hawaiian Islands, were, under and pursuant to the said treaty with that country and said act, admitted free of duty, and plaintiffs duly and specifically objected and protested to said defendant in

26 writing against the importation by him of any duty on their said molasses so entered for the reasons aforesaid.

Fourth. That despite the claims and against the protest of these plaintiffs, as aforesaid, the defendant treated said molasses as dutiable articles, and proceeded to and did ascertain, liquidate, and impose duties thereon at the rates of duty provided by the act of July 14, 1870, as amended by the act of December 22, 1870, and by the act of March 3, 1875, amounting to $658.94, in gold; and these plain-

tiffs, in order to obtain possession of their said molasses, had to and did pay the said amount of duties to the defendant, but only under a further due and sufficient protest in writing, wherein they notified the defendant on said entry of their dissatisfaction with his action and decision, setting forth distinctly and specifically, among the grounds thereof, that their said molasses, being Danish products as aforesaid, were entitled to be admitted free of duty by virtue of said Danish treaty, for the reason that under said Hawaiian treaty and act like articles of Hawaiian produce and manufacture were admitted free.

Fifth. That thereafter, within the time prescribed by law, the plaintiffs duly appealed from said action and decision of the defendant to the Secretary of the Treasury, who made his decision affirming and approving said action and decision of the defendant in the premises; whereupon plaintiffs in due time brought this action to recover back the duties so imposed by and paid to the defendant.

27 And plaintiffs further show that this action was commenced by summons in the supreme court of the State of New York, having jurisdiction thereof, and the same has been by the defendant removed from said court to this court by writ of certiorari under the statute in such case made and provided.

Wherefore the plaintiffs demand judgment against the defendant for the sum of thirty-three thousand two hundred and twenty-two $\frac{57}{100}$ dollars, in gold, being the aggregate amount of the several sums paid to him under protests, as hereinabove set forth, with interest and costs.

DUNNING, EDSALL,
HART & FOWLER,
Attorneys for Plaintiffs.

Office and post office address: No. 67 Wall street, New York.

CITY AND COUNTY OF NEW YORK, *ss:*

Thomas W. Bartram, being duly sworn, says that he is one of the plaintiffs above named; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

THOMAS W. BARTRAM.

Sworn to before me this 25th day of September, 1882.

28 RUDOLPH FRANK,
Comm'r of Deeds, N. Y. C. & Co.

(Endorsed:) U. S. circuit court, southern dist. of N. Y. Thomas W. Bartram & ano. *vs.* William H. Robertson. Copy [of] amended complaint. Dunning, Edsall, Hart & Fowler, pl'ffs' att'ys, 67 Wall St., N. Y. To S. L. Woodford, Esq., U. S. att'y, att'y for defendant.

29 United States Circuit Court, Southern District of New York.

THOMAS W. BARTRAM and JOSEPH B. BARTRAM, Plaintiffs,
against
WILLIAM H. ROBERTSON, Defendant. } 7996.

The defendant above named, by S. L. Woodford, U. S. attorney, for the defendant in the above-entitled action, demurs to the plaintiff's amended complaint in the above action—

First. Upon the ground that it does not state facts sufficient to constitute a cause of action against the defendant therein.

Second. Upon the ground that the above-entitled court has no jurisdiction over the cause of action alleged in said amended complaint against said defendant.

S. L. WOODFORD,
U. S. Attorney, Attorney for Defendant.

Office & P. O. address: Room 50, P. O. building, New York city.

30 (Endorsed:) U. S. circuit court, southern district of New York. Thomas W. Bartram & ano. *versus* William H. Robertson. Demurrer to amended complaint. Stewart L. Woodford, United States attorney, attorney for defendant. Service of a copy of the within is hereby admitted. Dunning, Edsall, Hart & F., New York, October 2, 188–, attorneys for plaintiffs. To D., E., H. & F., attorneys for plaintiffs.

31 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Friday the 9th day of February, in the year of our Lord one thousand eight hundred and eighty-three.

Present: The Honorable Wm. J. Wallace, circuit judge.

THOMAS W. BARTRAM *et als.*, Pl'ffs,
vs.
W. H. ROBERTSON, Def't. } 7996.

This action having been brought to trial on the issue of law joined herein, after hearing Stewart L. Woodford, United States attorney, in support of the demurrer, and Thomas H. Edsall, Esq., in opposition—

Ordered, That said demurrer be sustained and that defendant have judgment thereon, together with costs, to be taxed by the clerk of this court.

WM. J. WALLACE.

A copy.
[SEAL.] TIMOTHY GRIFFITH, *Clerk.*

32 *Judgment.*

United States Circuit Court, Southern District of New York.

THOMAS. W. BARTRAM & ANO. *vs.* W. H. ROBERTSON.

The issues in this action having been brought on for trial before Mr. Judge Wallace, on the issue of law joined herein, at a circuit court of the October term, 1882, and the issues having been tried, and a verdict for the defendant having been duly rendered on the ninth day of February, 1883, and his costs having been adjusted at $24.51, now, on motion of Elihu Root, United States attorney, for defendant, it is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $24.51, his taxed costs, and have execution therefor.

Judgment signed this 18th day of May, 1883.

JOHN A. SHIELDS,
Deputy Clerk.

(Endorsed:) United States circuit court. Thomas W. Bartram & ano. *vs.* W. H. Robertson. Judgment-roll. Elihu Root, United States attorney, for defendant. Costs, $24.51. U. S. circuit court. Filed May 18, 1883, 3.30 p. m. Timothy Griffith, clerk.

33 United States Circuit Court, Southern District of New York.

BARTRAM *et al. against* ROBERTSON.

WALLACE, *J.:*

The demurrer to the complaint presents the question whether the plaintiffs are entitled to recover duties alleged to have been illegally exacted by the defendant, as collector of the port of New York, upon the following facts: The plaintiffs, in March and April, 1882, imported several invoices of sugars and molasses, which were the produce and manufacture of the Island of St. Croix, a part of the dominions of the King of Denmark, upon which the defendant exacted and collected duties at the rates imposed on sugars and molasses by the act of Congress of July 14, 1870, as amended by the acts of Dec. 22, 1870, and March 3, 1875. These acts prescribe the duty to be collected upon all sugars and molasses of designated grades.

Since 1857 there has existed a treaty between the United
34 States and Denmark, one stipulation of which is as follows:

"No higher or other duties shall be imposed on the importation into the United States of any article the produce or manufacture of the dominion of his majesty the King of Denmark * * * than are or shall be payable on the like articles being the produce or manufacture of any other foreign country."

In 1875 a treaty was concluded between the United States and the Hawaiian Islands, whereby several specified articles, among them being sugars and molasses, but "being the growth, manufacture, or produce of the Hawaiian Islands," were to be admitted to all the

ports of the United States free of duty. This treaty was not to take effect until a law to carry it into operation should have been passed by Congress. In 1876 the necessary legislation was passed, and, upon due proclamation by the President, the treaty became operative, and has ever since remained in force.

The plaintiffs duly protested against the exaction of duties
35 upon their importation, insisting that by force of the treaties and legislation referred to their importations, being the produce and manufacture of the dominions of Denmark, were exempt from duty, and no other or higher duties could lawfully be imposed upon them than were payable upon like articles when the growth, manufacture, or produce of the Hawaiian Islands. Having taken all the requisite preliminary steps required by statute, plaintiffs brought this action to recover the duties exacted by the defendant. They now rely upon the position that the Danish treaty operates to limit the duties on Danish products to the amount collectable under the Hawaiian treaty upon Hawaiian sugar and molasses.

The consideration of the case will be simplified by assuming, without extended discussion, that the stipulation of the Danish treaty is operative and controlling except so far as it has been annulled by the subsequent laws of Congress. When the provisions of a
36 treaty, by their terms or by reasonable implication from their subject-matter, require legislative action to carry them into effect they do not operate of themselves. The Danish treaty contained two stipulations in separate articles that required the payment of money on the part of the United States. The other stipulations, including the one under consideration, could execute themselves. Congress made the necessary appropriation for the payment of the moneys provided (11 U. S. Statutes at Large, 261). No further action on its part seemed necessary, and its silence when the subject was before it is significant as a legislative construction that it was not required to speak.

That Congress had the power to annul this treaty, so far as it might have vitality as a rule of municipal law, is not disputed. Both treaties and acts of Congress are, under the Constitution, the supreme law of the land, and each are of equal authority within the sphere of the constitutional power of the respective depart-
37 ments of the Government by which they are adopted; therefore the treaty or the act of Congress is paramount according as it is the latest expression of the will of the law-making power. Ropes *v.* Clinch, 8 Blatch., 304; Taylor *v.* Morton, 2 Curtis C. C. Rep., 454; Gray *v.* Clinton Bridge, Woolworth, 150; Cherokee Tobacco, 11 Wall., 616.

Assuming the stipulation of the Danish treaty and that also of the Hawaiian treaty to be completely operative, the question in the case may, in one aspect, be considered as one of construction to ascertain the meaning and result of several laws adopted at different times relating to the general subject of duties to be imposed on importations from foreign countries. By the earliest law, the Danish treaty, all importations the product of the Danish dominions are to be free from the payment of higher duties than may be imposed upon

products when imported from any other foreign country. By a later law—the several acts of Congress imposing duties—specific
38 duties are laid upon enumerated articles, irrespective of the countries whence they are imported, and by the latest law—the Hawaiian treaty—importations the products of the Hawaiian Islands are exempted from duty.

The question would certainly be presented in a light the most favorable to the plaintiffs by reviewing their case as though, the Danish treaty being in force, Congress had subjected all sugars and molasses to specified duties excepting the sugars and molasses the product of the Hawaiian Islands. It cannot be fairly claimed that the Hawaiian treaty has more vigor than this would concede to it. Giving it this effect, an authority directly in point and adverse to the plaintiffs is found in Taylor *v.* Morton, *supra*. In that case a treaty between the United States and Russia contained a stipulation in the identical language of the Danish treaty (8 U. S. Statutes at Large, 446), and by the tariff act of 1842 Congress imposed a duty of forty dollars per ton on all hemps "excepting manilla,
39 sueva, and other hemps of India," on which a duty of twenty-five dollars only was laid. The collector of the port having exacted a duty of forty dollars per ton upon hemp imported from Russia, an action was brought to recover the difference between that duty and the duty collectable on the hemp of India upon the ground that by force of the Russian treaty no higher duty could be exacted than was leviable upon the hemps of India. It was urged that the tariff act should be read as though the Russian hemp were excepted as well as the Indian hemp. The court refused to sanction the suggestion, stating "that it would do violence to the language of the act and would force into it an exception which it does not contain."

Irrespective of the authority of Taylor *v.* Morton, and considered as an original proposition, there would seem to be no reasonable foundation for the plaintiffs' contention. By the legislation of Congress passed subsequent to the Danish treaty the duties on
40 importations from Denmark, as well as on all other importations, were imposed, as Congress had the right to prescribe them. It is not for the court to say that Congress did not intend to prescribe the duties it laid or incorporate an exception into the legislation which was not expressed. The court cannot assume that Congress was ignorant of the stipulation in the Danish treaty, and cannot undertake to decide whether Congress meant to ignore that stipulation or to recognize it. The judiciary must take the legislation as it finds it. It may interpret and construe when the language of legislation permits, but there its powers and duties end. Grant that every intendment should be implied in favor of the observance of treaty obligations, here is an explicit enactment which leaves no room for implication. Certainly no greater efficacy can be imputed to the Hawaiian treaty than to an act of Congresss of the date when the treaty took effect. If Congress at the time that treaty be-
41 came law had passed an act exempting importations from the Hawaiian Islands from duty, such an act would not manifest

an intent to create a further exemption in favor of importations from Denmark or to repeal existing duties on such importations.

Were it to be conceded that the stipulation of the Danish treaty should be deemed incorporated into the acts imposing duties, as though Congress had declared that the duties therein enumerated should not be collected on importations the products of Denmark at higher rates than might thereafter be imposed on importations being the products of any other foreign country, the plaintiffs would not be in any better plight. It would then be necessary for them to maintain that their importations were subjected to higher duties than the products of other foreign countries. How is it to be determined what duties are imposed on importations of other foreign countries except by a reference to the general
42 standard of duties? If the products of all foreign countries save one are subject to a uniform duty, how can it be said the plaintiff's products were subjected to a higher duty than those of any other foreign country? The meaning of the stipulation is that there shall be no unfriendly discrimination in the imposition of duties between the products of Denmark and those of other countries; the stipulation is satisfied when there is no discrimination according to the rule and policy observed with foreign nations in general. The plaintiffs' argument involves the assumption that the exception is to be deemed the general rule.

There is a broader view of the controversy, however, which cannot be slighted. Stipulations like the one relied on are found in upwards of forty treaties made between the United States and foreign powers since 1815. Without attempting an enumeration, it
43 suffices to say there is a similar stipulation in the treaty with Prussia, with Sweden and Norway, with [the] two Sicilies, with Portugal, with Nicaragua, with Hayti, with Honduras, and with Italy, all of which were in force when Congress enacted the present tariff act. If the argument for the plaintiffs is sound, all these treaty stipulations are to be deemed embodied in the tariff act, so as practically to exempt from duty the importations of all these foreign countries whenever the products of a single country may be exempted from duty.

Can it be for a moment supposed that a stipulation in a treaty with a single power, exempting the products of that country from the payment of duty when imported here, made in the interest of our own commerce or manufactures or designed upon special considerations of comity between the two nations, could be in-
44 tended to effect such a far-reaching abrogation of our own revenue laws as would thus ensue? The proposition is too startling to be entertained.

Other considerations are suggested opposed to the contention of the plaintiffs, but, without pursuing the subject further, it seems clear that their position is untenable.

Judgment ordered for defendant upon the demurrer.

45 [Endorsed:] U. S. circuit court, southern dist. of N. Y. Bartram *et al.* against Robertson. (Copy.) Opinion, Wallace, J. (Original.) Filed Jan. 16th, 1883.

[In pencil:] Judg't-roll. 1, service; 2, certiorari; 3, bill pay.; 4, comp't; 5, demurrer; 6, order for judg't; 7, judg't.

46 Supreme Court of the United States, of October Term, in the year A. D. 1884.

THOMAS W. BARTRAM and JOSEPH B. BARTRAM, Plaintiffs in Error.
vs.
WILLIAM H. ROBERTSON, Defendant in Error.

In error.

Afterwards, to wit, on the 2d Monday of October, in said term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Thomas W. Bartram and Joseph B. Bartram, by Dunning, Edsall, Hart & Fowler, their attorneys, and says that in and by the record aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appears that the
47 judgment aforesaid given was given for the said defendant in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs in error against the said defendant in error, and the said plaintiffs in error pray that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that they, the plaintiffs in error, may be restored to all things which they have lost by reason of said judgment.

DUNNING, EDSALL,
HART & FOWLER,
Attorneys for Plaintiffs in Error, 67 *Wall St., N. Y.*

Endorsed: U. S. Supreme Court. 7996. Thomas W. Bartram & ano. *vs.* William H. Robertson. Assignment of error. Dunning, Edsall, Hart & Fowler, atty's for for pl'ffs in error.

48 Due service of a copy of within assignment of error hereby admitted.
Jan'y 12th, 1884.

ELIHU ROOT,
U. S. Attorney, Attorney for Defendant in Error.

49 Supreme Court of the United States, of October Term, in the year A. D. 1884.

THOMAS W. BARTRAM & JOSEPH B. BARTRAM, Plaintiffs in Error,
ag'st
WILLIAM H. ROBERTSON, Defendant in Error.

Afterwards, to wit, on the second Monday of October, in said term, the said defendant in error, by Elihu Root, his attorney, comes here in court and says that there is no error either in the record or pro-

ings aforesaid or in the giving of the judgment aforesaid; and he prays that the said Supreme Court, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error,
50 and that the judgment aforesaid, in the form aforesaid given, may be in all things affirmed, &c.

ELIHU ROOT,
Attorney for Defendant in Error.

Endorsed: U. S. Supreme Court. Thomas W. Bartram & ano., pl'ffs in error, *versus* William H. Robertson, def't in error. Joinder in error. Elihu Root, United States attorney, attorney for defendant in error. Due service of a copy of the within is hereby admitted. New York, Jan'y 15th, 1884. Dunning, Edsall, Hart & Fowler, attorneys for plaintiffs in error. U. S. circuit court. Filed Jan'y 15th, 1884. Timothy Griffith, clerk.

51 *Bond for Damages and Costs.*

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

THOMAS W. BARTRAM & JOSEPH B. BARTRAM
vs.
WILLIAM H. ROBERTSON.

Know all men by these presents that we, William L. Southwick, of 222 Grand Ave., city of Brooklyn, and John Raven, of 231 East 13th street, New York city, are held and firmly bound unto the above-named William H. Robertson in the sum of two hundred and fifty dollars, to be paid to the said William H. Robertson: for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the fifth day of January, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas the above-named Thomas W. Bartram & Joseph B. Bartram have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Thomas W. and Joseph B. Bartram shall prosecute their writ of error to effect and answer all damages and costs if they fail to make their plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

WM. L. SOUTHWICK. [L. S.]
J. RAVEN. [L. S.]

Sealed and delivered and taken and acknowledged this 5th day of Jan'y, 1884, before me—

[L. S.]

JNO. A. HILLERY,
Notary Public, N. Y. Co.

52 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

William L. Southwick & John Raven, being duly sworn, depose and say, and each for himself says that he is worth the sum of five hundred dollars ($500) over and above all his just debts and liabilities.

WM. L. SOUTHWICK.
J. RAVEN.

Sworn to this fifth day of Jan'y, A. D. 1884, before me—
[L. S.] JNO. A. HILLERY,
Notary Public, N. Y. Co.

Within bond and the sureties thereto approved.
WM. J. WALLACE.

[Endorsed:] U. S. circuit court. Thomas W. Bartram & ano. *vs.* William H. Robertson. Bond for costs on error to Supreme Court. Dunning, Edsall, Hart and Fowler, att'ys for pl'ffs in error, 67 Wall St., N. Y. U. S. circuit court. Filed Jan'y 11, 1884. Timothy Griffith, clerk.

53 UNITED STATES OF AMERICA, ss:

To William H. Robertson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, eighteen hundred and eighty-four, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Thomas W. Bartram and Joseph B. Bartram are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Jan'y 11, 1884.

WM. J. WALLACE.

54 [Endorsed:] 7996. U. S. Supreme Court. Thomas W. Bartram & ano., plaintiffs in error, against William H. Robertson, defendant in error. Citation. Dunning, Edsall, Hart & Fowler, atty's for pl'ffs in error, 67 Wall St., N. Y. U. S. circuit court. Timothy Griffith, clerk. Jan. 12, 1884.

Due service of a copy of within citation is hereby admitted.
Jan. 12, 1884.

ELIHU ROOT,
U. S. Att'y, Attorney for Defendant in Error.

Endorsed on cover: S. New York, C. C. U. S. No. 275. Thomas W. Bartram and Joseph B. Bartram, plaintiffs in error, *vs.* William H. Robertson, collector of the port of New York. Filed August 6th, 1884.

122-116

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1886.

No. 275.

THOMAS W. BARTRAM and JOSEPH B. BARTRAM,
Plaintiffs in Error,

against

WILLIAM H. ROBERTSON, Collector of the Port of New York,
Defendant in Error.

Brief filed for Plaintiffs in Error.

STATEMENT OF CASE.

This writ of error is to review the judgment of the U. S. Circuit Court for the Southern District of New York sustaining a demurrer to the plaintiffs' complaint in a suit brought to recover duties alleged to have been illegally exacted by defendant as Collector of the Port of New York.

The plaintiffs in error had imported four importations of brown and unrefined sugars and molasses, the growth, produce or manufacture of the Island of St. Croix, a West India colony of and part of the dominions of His Majesty the King of Denmark. These importations were of such kinds or grades that if they had been produced or manufactured in the Hawaiian Islands instead of in St. Croix they would have been entitled to admission and would have been admitted into the ports of the United States free (Record, pp. 8-12) of duty, by virtue of an Act of Congress passed August 15th, 1876 (19 U. S. Stat. at L., p. 200), avowedly to carry into effect the treaty between the United States and the King of the Hawaiian Islands, the ratifications of which treaty were exchanged July 3d, 1875.

By the terms of this treaty the United States stipulated to admit into all ports of the United States, free of duty, a variety of scheduled articles, the growth, manufacture or produce of the Hawaiian Islands, among which articles were enumerated "molasses" and "unrefined sugars" like those in question imported by the plaintiffs.

(For Hawaiian Treaty see 19 U. S. Stat. at L., p. 625).

Article V. of this treaty provided that it was not to take effect "until a law to carry it into operation shall have been passed" by Congress. The law of August 15th, 1876, passed in accordance with the terms of Article V. of the treaty to carry it into operation, provided that whenever the President should become satisfied of the enactment by the Legislature of the Hawaiian Islands of the proper laws to give full effect to the Convention, he should issue his proclamation declaring that he had such evidence; and from the date of such proclamation the *following articles*, being the growth and manufacture or produce of the Hawaiian Islands, to wit, "unrefined sugars," "molasses" and *some* of the other articles enumerated in the schedule contained in Article II. of the Treaty, "*shall be introduced into the United States free of duty so long as the said Convention shall remain in force.*"

The proclamation contemplated by this Act was made September 9th, 1876 (19 U. S. Stat. at L., p. 666).

The Hawaiian Treaty by its terms was to "remain in force for seven years from the date at which it may come into operation," and further until after twelve months' notice of its termination which might be given. By its terms the action of Congress was necessary to render it operative (Art. V.).

It was while the Act of Congress of 1876 and this Treaty remained in force that the plaintiffs' importations of like articles, the growth, manufacture or produce of the dominions of the King of Denmark, occurred in March and April, 1882. The duties charged, $33,222.57, paid under appropriate protest and appeal, in accordance with the statutes, are alleged to be without warrant of law, the goods being exempt from duty under the then existing statutes, treaties and the "supreme law of the land."

The following unimpaired provisions in existing treaties between the United States and His Majesty the King of Denmark are pertinent:

The treaty dated April 11th, 1857, and proclaimed January 13th, 1858 (see "Treaties and Conventions," published Washington, 1873, page 214), abolishing sound dues, &c. (Arts. 1, 2 and 4), and providing for the money payments stipulated therein (Arts. 3 and 6), stipulated also as follows:

"ARTICLE V. The *General Convention* of Friendship, Commerce and Navigation concluded between the United States and His Majesty the King of Denmark on the *26th of April*, 1826, and which was abrogated on the 15th of April, 1856, and the provisions contained in each and all of its articles, the fifth article alone excepted, shall, after the ratification of this present convention, *again become binding upon the United States and Denmark;* it being, however, understood that a year's notice shall suffice for the abrogation of the stipulations of the said Convention hereby renewed."

The Convention of April 26th, 1826, thus renewed (*Ibid.*, p. 206), provided, among other things, as follows:

"The United States of America and His Majesty the King of Denmark, being desirous to make firm and permanent the peace and friendship which happily prevail between the two nations, and to extend the commercial relations which subsist between their respective territories and people, have agreed to fix, in a manner clear and positive, the rules to be observed between the one and the other party by means of a General Convention of friendship, commerce and navigation." * * * *

ARTICLE 1.

"The contracting parties, desiring to live in peace and harmony with all the other nations of the earth by means of a policy frank and equally friendly with all, engage mutually not to grant any particular favor to other nations, in respect of commerce and navigation, which shall not immediately become common to the other party, who shall enjoy the same freely, if the concession were freely made, or, on allowing the same compensation, if the concession were conditional.

ARTICLE 2.

The contracting parties, being likewise desirous of placing the commerce and navigation of their respective countries on the liberal basis of perfect equality and reciprocity, mutually agree that the citizens and subjects of each may frequent all the coasts and countries of the other (with the exception hereafter provided for in the sixth article), and reside and trade there in all kinds of produce, manufactures and merchandise; and they shall enjoy all the rights, privileges and exemptions, in navigation and commerce, which native citizens or subjects do or shall enjoy, submitting themselves to the laws, decrees and usages there established to which native citizens or subjects are subjected. But it is understood that this article does not include the coasting trade of either country, the regulation of which is reserved by the parties respectively, according to their own separate laws.

ARTICLE 3.

They likewise agree that whatever kind of produce, manufacture or merchandise of any foreign country can be from time to time lawfully imported into the United States, in vessels belonging wholly to the citizens thereof, may be also imported in vessels wholly belonging to the subjects of Denmark, and that *no higher or other duties* upon the tonnage of the vessel or her cargo shall be levied and collected, whether the importation be made in vessels of the one country or of the other. And, in like manner, that whatever kind of produce, manufacture or merchandise of any foreign country can be from time to time lawfully imported into the dominions of the King of Denmark in the vessels thereof (with the exception hereafter mentioned in the sixth article) may be also imported in vessels of the United States, and that *no higher or other duties* upon the tonnage of the vessel or her cargo shall be levied and collected, whether the importation be made in vessels of the one country or of the other. And they further agree that whatever may be lawfully exported or re-exported from the one country, in its own vessels, to any foreign country may in like manner be exported or re-exported in the vessels of the other country; and the same bounties, duties and drawbacks shall be allowed and collected whether such exportation or re-exportation be made in vessels of the United States or of Denmark. Nor shall *higher or other charges* of any kind be imposed in the ports of one party on the vessels of the other than are or shall be payable in the same ports by native vessels.

ARTICLE 4.

No higher or other duties shall be imposed on the importation into the United States of any article the produce or manufacture of the dominions of His Majesty the King of Denmark, and no higher or other duties shall be imposed on the importation into the said dominions of any article the produce or manufacture of the United States than are or shall be payable on the like articles being the produce or manufacture of any other foreign country. Nor shall any higher or other duties or charges be imposed in either of the two countries on the exportation of any articles to the United States or to the dominions of His Majesty the King of Denmark respectively than such as are or may be payable on the exportation of the like articles to any other foreign country. Nor shall any prohibition be imposed on the exportation or importation of any articles, the produce or manufacture of the United States or of the dominions of His Majesty the King of Denmark, to or from the territories of the United States or to or from the said dominions which shall not equally extend to all other nations.

ARTICLE 5.

Neither the vessels of the United States nor their cargoes shall, when they pass the Sound or the Belts, pay *higher or other duties* than those which are or may be paid by the most favored nation.

ARTICLE 6.

The present Convention shall not apply to the Northern possessions of His Majesty the King of Denmark; that is to say, Iceland, the Farroe Islands and Greenland, nor to places situated beyond the Cape of Good Hope, the right to regulate the direct intercourse with which possessions and places is reserved by the parties respectively. And it is further agreed that this Convention is not to extend to the direct trade between Denmark and the West India colonies of His Danish Majesty, but in the intercourse with those colonies it is agreed that whatever can be lawfully imported into or exported from the said colonies in vessels of one party from or to the ports of the United States, or from or to the ports of any other foreign country, may in like manner and with the same duties and charges applicable to vessel and cargo be imported into or exported from the said colonies in vessels of the other party.

ARTICLE 7.

The United States and His Danish Majesty mutually agree that *no higher or other duties*, charges or taxes of any kind shall be levied in the territories or dominions of either party, upon any personal property, money or effects of their respective citizens or subjects, on the removal of the same from their territories or dominions reciprocally, either upon the inheritance of such property, money or effects, or otherwise, than are or shall be payable in each State, upon the same, when removed by a citizen or subject of such State respectively."

* * * * * * * *

The provision in Article IV. that "no higher or other duties shall be imposed on the importation into the United States of any article the produce

or manufacture of the dominion of His Majesty the King of Denmark, * * * than are or *shall be payable* on the like articles, being the produce or manufacture of *any other* foreign country," applied in full vigor *after* September 9th, 1876, to Danish articles "like" the "unrefined sugars" and "molasses," enumerated in the schedule contained in the Act of Congress, passed August 15th, 1876.

Between September, 1876, and May 26th, 1882, when the Secretary of the Treasury decided plaintiffs' appeal, no legislation intervened applicable to the subject.

Neither general nor specific legislation affecting the said schedule occurred after 1876 until the enactment of the new general tariff of 1883, which was a substitute for and repeal of all existing tariffs of duties upon importations.

The existence of recent treaty provisions and the caution expended in the preparation of this measure doubtless occasioned its

"Section Eleven. Nothing in this act shall in any way change or impair the force or effect of any treaty between the United States and any other Government or any laws passed in pursuance of the execution of any such treaty, so long as such treaty shall remain in force in respect of the subjects embraced in this act. But whenever any such treaty, so far as the same respects said subjects, shall expire or be otherwise terminated, the provisions of this act shall be in force in all respects in the same manner and to the same extent as if no such treaty had existed at the time of the passage hereof" (22 U. S. Stat., 525)

Prior to 1883 no occasion had arisen for such a legislative provision as this section makes. No existing treaty or schedule or course of commerce had suggested it. No great staple or commodity from any foreign country had been meanwhile exempted or legislated upon. No opportunity had made it necessary to propose or to consider the effect of treaty provisions on proposed legislation. Until Congress assumed to legislate in imposing duties upon like articles to the growth, produce or manufacture of the Hawaiian Islands, the special treaty provisions which gave the cargoes from other friendly powers the advantages acquired by the enumerated importations from the Sandwich Islands formed no essential topic of legislative consideration.

Congress had done nothing evincing a purpose to interfere, nor did it interfere with existing treaties. Such treaties were the law; and it might be presumed that the executive and judicial departments of the Government would *apply* the law.

The claim of the plaintiffs is that the executive department in 1882 did *not* apply the law; which was that upon plaintiffs' importations, the produce of the dominions of the King of Denmark, "no higher or other duties" should be imposed in 1882 than were then payable on like articles, the produce or manufacture of the Hawaiian Islands.

If this contention be correct, the demurrer should have been overruled. The Court below sustained the demurrer in a brief opinion, holding this contention erroneous (Record, pp. 16, 17 and 18).

QUESTIONS.

The questions presented are the interpretation and application of the clause in the Danish Treaty, providing that "no higher or other duties" shall be imposed on certain articles the produce of the dominions of Den-

mark "than are or shall be payable" on the like articles from "any other foreign country."

How and when does this provision take effect? Will not the Executive and the Judiciary apply it? Did any legislation exist in 1882 (the date of the importations in question) that in any wise impaired its vigor? Were not the articles enumerated in the Act of Cóngress of August 15th, 1876, if the produce or manufacture of the dominions of Denmark, exempt from duty by reason of that statute and its necessary relation to existing treaty provisions with that government?

ASSIGNMENTS OF ERROR.

It was error to direct judgment for defendant upon the demurrer.

It was error not to overrule the demurrer and to permit the cause to proceed to judgment upon the allegations of the declaration.

There were four counts or causes of action stated. See Record, p. 8, etc., and Paragraph Sixth at folio 17, where a perfect cause of action is stated, unless it be the law that there are no Danish products that may be admitted free because of the Danish Treaty and the Act of Congress of August 15th, 1876. Such, as plaintiffs contend, not being the law, it was error to hold that no cause of action was stated.

POINTS.

I.

The gravity of the questions presented by the case at bar in a revenue or commercial sense have been industriously magnified. Their gravity, as affecting the actual and moral obligations dependent for their peaceful enforcement exclusively upon our national honor, cannot be magnified.

By the United States Constitution (Art. 6, Sec. 2) Treaties as well as Acts of Congress, made under the Constitution, are the supreme law of the land (1 Kent Com., 166).

In seeking for that law, neither Courts nor officers will create imaginative repugnancy; nor will it be assumed that any department wittingly evades or eludes obedience to the constitutional mandate.

In the exposition of treaties, statutes and contracts there is the common necessity to ascertain intention; deducing it when possible from the language itself, but aided if necessary by such useful factors as the occasion of its use, the accepted signification of an expression, the public history of the times, and the purpose, when it is obvious, that is sought to be accomplished by the language selected. "In treaties made with different parties the inquiry in cases of conflict (says Woolsey*) touches the *moral obligation*." Treaties are recognized as the highest order of civil obligation known to civilized society. By reason of their international effect, the circumstances attendant upon their origin, negotiation, ratification and operation, the history of treaties does not exhibit contentions touching their import and sig-

* Woolsey Int. Law, p. 186.

nification of the character attendant upon controversies over the import and signification of statutes and of contracts.

The principles by which treaties should be construed have been readily accepted and unconcernedly stated by the acknowledged authorities.

In interpreting treaties, due and judicial regard should be had to the occasion which produced them, the subject matter of their stipulations, the object for which and the epoch during which they were contracted.

2 *Phil. Int. Law, p.* 56.

"When the apprehensions of a particular event has been the reason of a particular provision of a treaty this provision is not to be restricted to cases in which such an event is improbable, but to be extented to cases in which the event is possible.—Vattel." (*Ibid, p.* 107.)

"As a matter of international law, there is no doubt that if the treaty making department of a nation concludes a treaty by which it is agreed that certain things are to be done, the nation is bound; and it is no answer to another nation, in case of a breach of the contract, to set up a failure of a different department of the Government to conform to the treaty. That amounts to no more than giving the internal municipal history of the breach. The distribution of powers a nation chooses to make in its own Constitution of Government furnishes no excuse for a failure of the nation to do what it has contracted to do. As matter of constitutional law it follows from the above statement that *each department of Government must discharge its appropriate function* towards the performance of whatever the nation has bound itself to do."

Note to Dana's Wheaton's International Law, Section 266.

"If the consent of a local or subordinate authority is necessary to give effect to any part of a treaty that should appear in the treaty itself;" *Ibid.* And so it has been the custom of the United States in its treaties to insert appropriate clauses of that character when such action is required.

While Congress is under obligation to do that which on its part may be essential (*e. g.*, by way of appropriation) to execute a treaty provision, yet that obligation is no greater than the obligation resting on other departments of the Government to execute all treaties, so far as a department under its appropriate functions is authorized to administer and to apply the provisions of law which by the United States Constitution may be contained in treaty provisions. Nor can this obligation be escaped by the judiciary because it may deem Congressional action in a given case wiser and more expedient than the conservative declarations of the bench.

The Supreme Court of the United States by its traditions and duties is especially constituted to interpret and to apply international obligations in their relations to municipal law, and in so doing will summon to its aid so much of the recognized law of nations as has already passed into and become part of the common law.

"Treaties of every kind, when made by the competent authority, are as obligatory on nations as private contracts are upon individuals; and they are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and force of reasoning which we apply to the interpretation of private contracts."

1 *Kent Com.*, 175.

It is, moreover, the settled rule of the Supreme Court, repeatedly declared, that treaties are to receive a fair and liberal interpretation. Thus, even if

two constructions became possible, "one restrictive as to rights that may be claimed under it and the other liberal, the latter is to be preferred (Shanks *vs.* Davenport, 3 Peters, 242). Such is the settled rule of this Court."

Hauenstein vs. *Lynham*, 100 *U. S.*, 487.

II.

The initial enquiry here is—

First.— What has the United States contracted to do; and

Second.— What obstacles exist, if any, and by whom interposed, against the fulfillment of the obligations assumed.

III.

The obligation on the part of the United States in respect to the importation of certain articles, the produce or manufacture of the dominions of the King of Denmark, is absolute and unqualified. It is that upon such articles "*no higher or other duties* shall be imposed" than are or "shall be payable on the like articles, being the produce or manufacture of *any other foreign country*." It is by the use of these terms that the United States have declared and fixed "in a manner clear and positive the rules to be observed" in the commercial relations between the territories and people of the United States and the dominions of the King of Denmark.

(See Preamble to Treaty of 1826, *supra*).

The reciprocity was in a similar obligation upon the government of Denmark.

This Article IV. of the treaty in no rigorous sense depends for its vigor, or explanation, on any other article of the treaty. Money payments, it is true, and large navigation concessions are stipulated for; but each and every stipulation of that character is severable and capable by itself of exact fulfillment.

It is noteworthy that by Article I. particular favors "in respect of commerce and navigation" granted to other nations shall immediately and upon the same terms become common to the other nation. This general "favored nation" clause, so-called, was not deemed adequate to fulfill the exigencies existing and contemplated concerning the exchange of dutiable importations between the high contracting parties. No "higher or other duties" were in the minds of the parties touching certain described species of merchandise, as "no higher or other duties upon the tonnage of the vessel or her cargo" were likewise in view when Article III. was framed to establish perfect freedom and reciprocity in the transportation and exchange of the produce of the respective parties.

IV.

There is probably no treaty provision common to the history of Am diplomacy whose meaning is less open to doubt or less capable of illust from the history of the times in which it has been used and the purpc its use than the provisions found in Article IV. of the Danish of 1826.

The language selected is clear and unambiguous. It had a well d historic purpose in its origin and use. It signified the authoritative de tion on the part of the United States that when at some future time it by its laws and governmental policy diminish the duties on (vessels or cargoes imported from *any foreign country*, or grant special exemptic particular products *of any foreign country*, that the same diminutior exemptions should thereupon immediately apply to the like products Danish dominions.

In respect to unrefined sugars and molasses, the United States G ment lawfully determined, by Act of Congress, to exempt from duty September 9th, 1876, those products of the Hawaiian Islands. Ther if any such products of the Danish dominions became articles of im tion into the United States, such unrefined sugars and molasses immed became subject to "no higher or other duties." The exemption fas itself September 9th, 1876, after which time Article IV. became oper Until the occasion contemplated by its terms should legitimately aris article was dormant. When the special event or enactment provide had occurred, the positive and unimpeachable terms expressed i language selected at once became operative and vital. Thereafter it be part of our national policy, and was engrafted into the national laws.

V.

Why has not this treaty provision been regarded by the Exec Department?

The matter does not seem to have been brought to its attention about 1882, probably because after 1876 the duty upon no great staple duct of any one of the smaller commercial powers with whom the U States have entered into this reciprocal stipulation was seriously affe The schedule in the Act of 1876 is brief and touches few articles of in tations from places affected by such stipulations. Indeed, even nov question is not an important one in a fiscal sense. The subject seen have been disposed of in 1882 by the Treasury Department in a perfun manner, and without reference to the opinion of the Attorney-General. substantial consideration seems to have been given to the matter by Government, until after the brief opinion by Judge Wallace in this which, without further inquiry, was adopted as the law.

That opinion is now respectfully challenged as untenable, accordin the principles of the law of nations and the settled adjudications of Court in the application of that law and of treaty provisions determin of private and governmental rights. Nor should it be forgotten that case is a *public* one and not exclusively a private controversy betwen vidual litigants. It involves the right of the *Government* to proce violation of a treaty against a private litigant; and to sustain this violatic the part of officers bound to regard treaties as laws no unwarrantab illiberal presumptions should be indulged in.

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VI.

is Court has settled the force and effect of treaty stipulations generally
e obligations of the judiciary concerning their fulfillment. This is
ase where Congress has done any act since the treaty provision in
on was vitalized in 1876 to interfere with its operation. It is only
ecutive Department that has intruded upon the treaty, and the single
on is, *was that intrusion justifiable?*

T may be conceded, as said by Miller, J., in the Clinton Bridge Case
I worth, 155–6), that the Courts possess no power to declare a statute
l by Congress and approved by the President void because it may
S a treaty (*Amiable Isabella*, 6 *Wheat.*, 1). Questions of this class are
the f national questions to be settled between the foreign nation interested
he political department of our Government. "When those depart-
declare a treaty abrogated, annulled or modified, it is not for the
l branch of the Government to set it up and assert its continued
tion" (6 *Wall.*, 50). But the defendant Collector is without power
T ul a treaty, and if such power be assumed without authority, the
ary will apply the remedy.

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the case at bar this Court is called upon to interpret and to apply
eaty, and to determine, in disposing of the resistance of the Executive
rtment to its application, whether that resistance is by proper
rity, and *whether either Congress or any governmental authority has
ny wise intruded upon the operation of the treaty article in question
upon the co-ordinate obligation on the part of the Judiciary Department
e United States Government to enforce this treaty as part of the
al law of the land.*

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VII.

true, n 119 U. S., 408, it is remarked:
stipu peculiarity of "the judicial powers of the Courts of this country in
fulfill to treaties is thus alluded to by Chief Justice Marshall in the
Ir me Court of the United States: 'A treaty is in its nature a contract
merc en two nations, not a legislative act. It does not generally effect, of
the s the object to be accomplished, especially so far as its operation is
natio territorial; but is carried into execution by the sovereign power of the
existi tive parties to the instrument. *In the United States a different prin-*
betw *established.* Our constitution declares a treaty to be the law of the
the n It is consequently to be regarded in courts of justice as equivalent
as '*an act of the Legislature*, whenever it operates of itself without the aid
we any legislative provision.' * * * (*Citing Foster* vs. *Neilson*, 2 *Peters*,
don 314). * * * The Courts are bound to take judicial notice of and to
the rce in any appropriate proceeding the rights of persons growing out of
treaty." Upon the principle expressed in the syllabus of this case
vs. *Rauscher*, 119 *U. S.*, 408), "that a treaty to which the United
in is a party is a law of the land, of which all courts, state and national,
take judicial notice, and by the provisions of which they are to be
erned, so far as they are capable of judicial enforcement," this Court
eded to inquire "into the true construction of the treaty" of 1842 with
Britain, which was under advisement in that case (*Ibid, page* 419).

The proposition was approved that "a right of person or property secured or recognized by a treaty" may be set up as a defense to a prosecution in disregard of either, with the same force and effect as if such right was secured by an act of either" (*Ibid, page* 426). In the opinion dissenting from the conclusions of the Court, the learned Chief Justice concedes "that the treaty is as much a part of the law of the United States as is a statute"; and that anything in it may be used directly as a defense by the interested party, &c. (*Ibid, page* 434).

Hence in the case at bar, if a treaty right or exemption exists, the Collector's enforced exaction of duties was unlawful, and the plaintiff's involuntary payments are recoverable at law.

VIII.

The instances in which the Supreme Court has expounded treaty provisions and applied them to individual rights of property and of person are too numerous to justify their review in this brief. State courts also in many justifiable cases have proceeded in the same way.

Orser vs. *Hoag*, 3 *Hill*, 79, is one of a class of cases which shows a judicial administration of treaties providing (as many United States treaties have provided) for existing titles. Also *Hutchinson* vs. *Brock*, 11 *Mass.*, 122; *Jackson* vs. *Porter*, 1 *Paine, C. C. R.*, 481; *Anderson* vs. *Lewis*, 1 *Freeman's Ch.*, 183, where State court in expounding and applying an Indian treaty says: "Where individual rights vest under a treaty, its meaning in reference to that is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts. It must receive such construction as will best effectuate the intention (see Vattel, Chapter 17)."

State statutes in conflict with treaties fall to the ground under judicial declarations to that effect (1 Madison's Works, page 524; 7 Hamilton's Works, page 512; Rawle on Constitution, page 59). So it has been repeatedly adjudged in cases of serious conflict (8 *Opinions Attorney General*, 417); and so it would be held again should a case arise, for instance, where the treaty-rights and privileges of subjects of the King of Denmark should be infringed upon by State legislation.

This Court will take the treaty provision as municipal law and apply it to the case in hand unless insurmountable obstacles intervene. In the entire absence of any Congressional action since (1876) the Treaty provision became operative, *no obstacle*, and no reason for one, *is presented.*

The following are some of the notable instances where this Court has expounded treaties or determined rights claimed under treaty provisions:

U. S. vs. *Schr. Peggy*, 1 *Cranch*, 103. By Section 5 of Act of Congress, July 5th, 1798, French armed vessels with their material and goods on board captured by American privateers should be forfeited and on condemnation distributed among the captors. The French schooner "Peggy" being thus captured, was condemned by decree in Connecticut Circuit September 23d, 1780. Pending an appeal from this decree a treaty was ratified, the fourth article of which stipulated that "property captured and not yet definitely condemned, or which may be captured before the exchange of ratification, shall be mutually restored." There was no legislative act to give effect to

this treaty provision, or so impair the operation of the Act of Congress and the lawful decree of the Court, which had been rendered pursuant thereto. But this Court held that the treaty provisions supervened and directed the release of the vessel. Chief Justice Marshall said : "Where a treaty is the law of the land and as such affects the rights of parties litigating in this Court, that treaty, as such, binds those rights and is as much to be regarded by the Court as an Act of Congress ; and, although restoration may be an executive act, when viewed as a substantive act independent of and unconnected with other circumstances, yet to condemn a vessel, the restoration of which is directed by a law of the land, would be a direct infraction of that law, and, of consequence, improper." So, here, for the executive to impose "higher or other duties" on Danish products than are imposed by law on like products from "any other foreign country" is an infraction of law cognizable in the courts, and for which the judiciary affords the exclusive remedy. The Court held that not only was the judiciary at liberty to regard the treaty as operative without reinforcement by Act of Congress, but it was bound so to regard it. The requirement of the stipulation was operative and obligatory by force of the treaty alone.

In Ware vs. *Hylton*, 3 *Dallas*, 239, the relation between a Virginia statute and the stipulation of Article 4 in the Treaty of 1783 was considered at great length, and the treaty itself deliberately expounded and applied. The principles, also, according to which inquiries of this nature should be judicially pursued, were learnedly denoted.

Chace, J., said : "I will adopt following remarks which I think applicable (2 Ruth., 307–315, Vattel 2, Chapter 17, Sections 263–271). The intention of the framers of the treaty must be collected from a view of the whole instrument and from the words made use of by them to express their intention, or from probable or rational conjectures. If the words exhibit the meaning of the parties plainly, distinctly and perfectly, there ought to be no other means of interpretation, but if the words are obscure or ambiguous or inappropriate, recourse must be had to other means of interpretation, and in these three cases we must collect the meaning from the words or from probable or rational conjectures, or both," &c., &c. (page 240). Then he remarks as to the Article 4, that it is stipulated "certain things shall *not* take place." * * *

Iredell, J.: "I consider a treaty as a solemn promise by the whole nation that such and such things shall be done or that such and such rights shall be enjoyed" (page 272).

In *Society*, &c., vs. *New Haven*, 8 *Wheat.*, 464, this Court applied the terms of Article 6 of Treaty of 1783, as confirmed by Treaty of 1794, to the property rights of a benevolent society without legislative intervention.

In *Orr* vs. *Hodgson*, 4 *Wheaton*, 462, the two treaties of 1783 and 1794 with Great Britain were directly applied by the judiciary, according to their terms, without intermediate provisions by Congress detailing how and in what manner those terms should be made effective ; and provisions prohibiting certain confiscations and prosecutions, and giving validity to titles according to specified tenures were at once interpreted and applied to the facts of the case in hand.

In *Fairfax* vs. *Hunter's Lessee*, 7 *Cranch*, 627, a similar course was approved.

In *Bright's Lessor* vs. *Rochester*, 7 *Wheat.*, 544, treaty provisions were applied in the first instance by a State court without legislative intervention.

In *Chirac* vs. *Chirac*, 2 *Wheat.*, 271, Chief Justice Marshall directly

applied a treaty right, which having vested was judicially maintained, notwithstanding the treaty had expired (*Ibid.* 277).

The propriety of judicial interpretation of a treaty (1853) with France was not questioned when the legality of a State succession tax claimed to intrude on treaty rights was before the Supreme Court in 1856 (*Prevost* vs. *Greneaux*, 19 *How.*, 7).

Further illustration is afforded by the numerous instances where the judiciary determined property rights depending upon the treaty of Guadalupe Hidalgo, and upon treaties ceding territory; and where the treaty stipulations were applied directly to the case in hand, touching which there had been no special legislation.

In *Foster* vs. *Neilson*, 2 *Peters*, 314, the Court held that the language of a treaty declaring valid Spanish grants made before 1818 did not act directly on the subject so as to repeal acts of Congress repugnant to it; but that the treaty language was that such grants *shall be ratified.* "It did not say that those grants are hereby confirmed." Congress should confirm and ratify; and it had apparently so understood the article, for it had legislated upon the subject. Subsequently, in *U. S.* vs. *Percheman*, 7 *Peters*, 86, the Court held that the action of Congress was *not* necessary to ratify and confirm. See *Garcia* vs. *Lee*, 12 *Peters*, 518, *reviewing both cases.*

In *Comegys* vs. *Vasse*, 1 *Peters*, 193, Story, J., proceeded to expound treaty with Spain.

In *The Amiable Isabella*, 6 *Wheat.*, 71, the Supreme Court says: "This Court does not possess any treaty-making power. That power belongs by the Constitution to another department of the government; and to alter, amend or add to any treaty by inserting any clause, whetheh small or great, important or trivial, would be on our part an usurpation of power and not an exercise of judicial functions. It would be to make, not to construe, a treaty. Neither can this Court supply a *casus omissus* in a treaty any more than in a law. *We are to find out the intentions of the parties by just rules of interpretation applied to the subject matter, and having found that, our duty is to follow it as far as it goes*, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind." * * * "We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation upon any notion of equity or general convenience or substantial justice. The terms which the parties have chosen to fix * * * and the circumstances under which they are to have operation rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the modal parts of the treaty equally give the rule to judicial tribunals."

Oldfield vs. *Marriott*, 10 *Howard*, 146, was suit for duties paid on coffee from Brazil in Portuguese vessels arriving at Baltimore in 1847, claimed free under treaty of the United States with Portugal of 1840, making exemptions of "other duties and charges" on Portuguese vessels coming to the United States more favorable than the charges imposed on national vessels coming from the same place.

Duties were assessed under Tariff of 1846 at twenty per cent., by which tariff (Schedule I.) coffee when imported direct in American vessels or in foreign vessels entitled by reciprocal treaties to be exempt from discriminating duties were to be free. The question, therefore, was whether the treaty with Portugal was one of those referred to in Schedule I., and *held* it

was not; the Court entering upon full enquiry of the treaties of the United States cognate to the discussion, and for that purpose taking into consideration political acts of the government of Portugal.

Plaintiff claimed that all coffee imported from the place of its growth in American vessels, or in foreign vessels, which under reciprocal treaties are exempt from discriminating duties, is free. Prior to 1846 an additional duty (discriminating duty) of ten per cent. was imposed on goods imported in foreign vessels beyond that imposed on goods in American vessels.

Portugal had in six months after the treaty (page 158) imposed a discriminating duty on goods in foreign vessels which were not the product of the country to which the vessels belonged. The Court entertained consideration of this act of Portugal in arriving at its judgment and construing the treaty.

The Attorney-General showed that the acts of Congress had a well-defined meaning, "a sense understood at home and abroad as belonging to the policy of the United States for countervailing by discriminating duties the policy of foreign nations injurious to the policy of the United States," which policy is not fulfilled by the repeal by foreign nations of the discriminating duty on vessels and tonnage whilst the discriminating duties on *merchandise* remains, that the reciprocity required by the statute was to exempt *merchandise* from the discriminating duties when conveyed in American vessels. This view was finally taken by the Court. In construing the treaty, Wayne, J., distinguished between the provision for *vessels*, and the absence of any word "in the article relating to the duties upon the *cargoes of the vessels* of either nation," and the absence in the treaty of any restriction upon either nation for levying discriminating duties upon the cargoes carried by the vessels of either into the ports of the other when made up of produce of a different nation than that to which the vessel belongs or not the production of Portugal or the United States. The Court shows by public history and national acceptation that both nations so understood the treaty (pages 158–159), and that the legislation of 1846 was *not* in contravention of any treaty obligation. Pages 160 to 172 *review the history of our treaties* to show this.

In a note to this case, at page 173, reference is made to an order of the Treasury Department giving effect in 1849 to an Act of Congress of 1817 dependent upon the legislation of foreign governments, *i. e.*, Great Britain; and official cognizance was taken of an Act of Parliament, so that the revenue officers applied the Act of 1817 as *the result of operating our laws in the very contingency they in terms provided for.* The event stipulated for had occurred thirty-two years after 1817 by Great Britain abandoning her restrictions upon American vessels and accepting reciprocity.

A more extreme but noteworthy illustration of departmental action in support of treaty obligations is a Treasury circular of July 16th, 1844, in which the secretary instructs Customs officers that he regarded the Act of Congress of August 30th, 1842, which imposed a higher duty on the red and white wines of Portugal than was imposed on the red and white wines of France as in conflict with the treaty with Portugal of August 26th, 1840, and that therefore he should disregard to that extent the later law of Congress and enforce the treaty.

IX.

Congress has not interfered with the treaty.

No act of Congress has directly or indirectly infringed upon the force and effect of the stipulations in question made by the treaty with Denmark. It does not appear that at any time since its date (1857) Congress has imposed "higher or other duties" on Danish products than it imposed on like articles, the products "of any other foreign country." When the obligations on the part of the United States fastened themselves by the President's statutory proclamation of September 9th, 1876, the rights and privileges of importers of Danish sugars became vested. The reciprocal *value* of the admission into Danish ports of American products on paying no higher duties than charged by Denmark on like articles the products of any other foreign country does not appear. This reciprocal *right*, however, did exist from 1858, and continues unimpaired. Because of the historical uniform treatment by the United States of all foreign nations, the stipulation in question may have been a *valueless* one. But it *existed* all the same; and after 1876 fastened itself upon native unrefined sugars as imported by the plaintiffs. By the plaintiffs' importation, subsequent to the Act of Congress of 1876, the precise event stipulated for in the Danish treaty did occur, and the obligatory requirement, namely, that thereupon the stipulated duties and no other "shall be payable," became the law of the land for citizens and officers and for Courts.

X.

Action of Congress unnecessary.

Nor is any legislation requisite to vitalize the treaty articles in question.

Is the action of Congress requisite in respect to every treaty stipulation that by its terms depends upon some future event? If so, the proposition is against principle and without authority. Yet the proposition must be true, if legislation be required to carry into operation the treaties under advisement in the case at bar.

In the report of a Committee of the Senate and House of Representatives (1816), Mr. Forsyth to the House of Representatives thus stated the principle:

"Your Committee understood the Committee of the Senate to admit the principle contended for by the House, that whilst some treaties might *not* require, others may require, legislative provision to carry them into effect. That the decision of the question *how far such provision was necessary must be founded upon the peculiar character of the treaty itself.*"

See United States Treaties and Convention, page 944, *Govt. Publn.*

Supppose that a treaty had provided (as Article 3 of Treaty of 1803 did provide) that the inhabitants of certain territory ceded to the United

States should enjoy all the "rights, advantages and immunities of citizens of the United States," and be "protected in the free enjoyment of their liberty, property and the religion which they profess," and an appeal should be made to the judiciary to enforce such an article in a proper case. Could the courts respond that Congress must first legislate *how* that shall be done under every conceivable state of facts before the judicial arm shall exert itself in aid of such a treaty? But this Court having the language of such a treaty before it (in U. S. *vs.* Reynes, 9 Howard, 151) proceeded to regard it, and to constrne its meaning and to define the word "property" as there used.

In 6 Opinions Attorney-General, 297, it is said: "Whether any legislation be necessary or not depends on the conditions of the treaty compared with the provisions of the existing law pertinent to the subject matter.". The "subject matter" here is import duties dependent upon a government conclusion of the United States touching similar imports in 1882 from other foreign countries. What was the "existing law" pertinent when the Hawaiian Treaty Act of 1876 was passed? It was that *all* sugars were dutiable. For that very reason, probably, certain Hawaiian sugars were made free. It then followed as a necessary conclusion that thereafter similar Danish sugars were free. It required no act of Congress to reach that inevitable conclusion.

XI.

Suppose Article IV. of the Treaty was an Act of Congress? Read it as a statute existing or enacted in 1876. It had not hitherto been impaired. Would any further legislation be requisite to enable the executive departments to apply its language as a statute, or the judiciary to enforce it?

The treaty in all its force and vigor must be read and applied as co-ordinate in authority with the Act of August 15th, 1876; and both laws by virtue of their terms are immediately applicable to any case clearly within them. That the case at bar come within those terms is conceded in the record by the demurrer.

Read as a statute in 1882, existing at all events since September 9th, 1876, *the Danish Treaty operates*; of itself, *proprio vigore*, to *limit the rate and amount of duties on Danish products* to such rate and amount of duties as *may be at any time payable* on the *like products of any other foreign country*.

XII.

In the opinion of the Court below it is suggested that the most favorable view for the plaintiffs was that Congress had "*subjected all sugars*" to specified duties, *excepting* those from the Hawaiian Islands. Is not this a misstatement of the acts of Congress? The sugar duties were imposed by the Revised Statutes of 1874 as amended in 1875. (U. S. R. S., sec. 2504, Sched. G.; 18 Stat. at L., 339). In the imposition of these duties there was

no exception. Sugars from Hawaiian and Danish dominions were both subject to uniform duties. The Danish Treaty was alive, but in that condition of the United States tariff had affored no exemption to Danish sugars. The Hawaiian Treaty had not yet obtained.

The imposition of duties upon *all* sugars did not suspend, repeal, modify or in any wise infringe upon the provisions of the Danish Treaty of 1857. The *treaty* was in nowise affected by this tariff; nor by any tariff until 1876.

The force of the Act of 1876, exempting unrefined Hawaiian sugars was thenceforward to leave dutiable all others sugars, except sugars exempted because Hawaiian sugars were free. That which depended on the exemption of Hawaiian sugars became the dutiable or non-dutiable sugars *after* 1876. It was not the Act of 1876 that subjected *all* sugars to prescribed rates of duty *except* Hawaiian sugars, as the learned judge argues. The Act of 1876 made all sugars free which *depended upon that act.* The Act of 1876 made no exceptions.

Had Congress attached to that act a proviso that its enactment should not be held to give effect to the provisions of any treaty between the United States and any foreign power, there might be some justification for the courts to make a judicial appendix of such a character. Had it been exceptionally designed by Congress that the free admission of these Hawaiian products should not bring about the free admission of those from Denmark also, it would have been enacted by proviso or otherwise that the exemption of the former should not apply to the latter; or that Danish products, or the products of all other countries than the Hawaiian Islands, should continue to pay duties according to the then existing tariff; or by some other unequivocal act or declaration Congress would have made known such intention. It is not to be inferred or implied. It is, however, fair to assume that any attempt to insert such proviso would have been fairly regarded by Congress as a design to violate a treaty obligation which it is as much the Constitutional duty of Congress as of the other departments of the government faithfully to observe. The Courts may not create such a proviso.

It is respectfully insisted that the learned judge below has erred in his statement of the relation of the legislation to the treaty, and therefore of the gravamen of the present controversy.

The cases cited by him to sustain the conclusions otherwise arrived at turned upon instances of legislation imposing specified taxation in alleged derogation of existing treaty privileges—*which is not this case;* and if Congress had done that thing (which in most of the cases cited was a matter of dispute) then there followed some discussion of the power of Congress so to do.

Allusion here need be made to only one of the circuit cases cited, *Taylor* vs. *Morton*, 2 *Curtiss, C. C.*, 454, because relied upon below as being specially pertinent, notwithstanding the circumstance that, when that case was before this Court, it was disposed of without reference to the topic now under discussion (see 2 Black., 481). A treaty with Russia contained a stipulation similar to that under discussion here when in August 30th, 1842, Congress imposed a duty of forty dollars per ton on *all* hemps, exepting manilla, sunn and other hemps of India, on which twenty-five dollars per ton only was laid. This tariff was *subsequent* to the treaty. In favor of the lower duty on hemp from Russia it was claimed that it was a like article to the hemps of India; and that the Tariff Act should read as though the Russian hemps were excepted as well as the Indian hemps. The Court re-

fused to sanction the suggestion, stating "That it would do violence to the language of the act, and would force into it an exception which it does not contain" (see the Record on this Writ, folio 39). So in the case at bar, it would "do violence to the language of the Act of 1876, and force into it an exception which it does not contain," to add thereto a proviso that the Hawaiian exemptions shall not apply to existing treaty stipulations.

While in this case and the cases cited in *Eldy* vs. *Robertson*, 112 *U. S.*, 597, and in *Cherokee Case*, 11 *Wall.*, 616, it was declared that legislation *would* override a treaty, if in conflict with it, the instances are rare and of a very limited and specified character where such a conflict has been finally ascertained.

In *Curtiss* vs. *Fiedler* and *Ropes* vs. *Clinch*, it was held at circuit that there were irreconcilable differences between a tariff imposing a differential duty *specifically* on "Russian hemp" (12 U. S. Statutes at Large, 292), and a prior treaty with Russia of like purport to the treaty provisions under present consideration.

In the *case at bar there is an absence of any legislation whatever happening after the activity of the treaty article in question;* and consequently nothing upon which to base the argument about collision of authority.

XIII.

Indeed, while the articles of the treaty with Denmark, as revived in 1858, have remained in force, no legislation by Congress after 1876, looking to a suspension or restriction of rights as expressed in the article in question, was possible without a breach of faith towards Denmark. Nor has it been attempted. Nor will any such attempt or result be presumed. If it exists it must be clearly exhibited. Congress carefully protected Denmark's rights on the only occasion after they had vested that it considered the subject.

XIV.

1. Treaty privileges, like those under present discussion, as to "no higher or other duties," originally contemplated, of course, a reference to the duties exacted upon importations from countries other than the contracting powers. *The treaty privilege or right* was not only dependent on such a legitimate reference, and conditional upon it, but *was valueless* as a treaty provision *unless immediately measurable by the duty assessable on importations from other foreign countries.* It signified that such other importations should not be privileged at a lower duty than charged on Danish products. If any importations should be charged less than charged on Danish products, then as to the unequal imposition of charges upon the latter there is a violation of the treaty stipulation.

2. By what enactment has Congress declared or directed that violation? It will neither be presumed nor implied. Congress has not enacted that Hawaiian should be charged less than Danish products, or Danish products more than Hawaiian products. It simply declared in 1876 uniformity is no

longer essential; Hawaiian products shall be free. The rest was already provided for by treaty and by the legal exemptions thus created.

XV.

There is but one basis upon which to answer the plaintiffs' contention, and that is, that the treaty stipulation requires legislation to carry it into effect, because nothing in a treaty can affect duties on imports while it is the constitutional prerogative of the House of Representatives to inaugurate bills to raise revenue. This may be fair ground why treaties concerning duties should not be *ratified.*

But such treaties have been made by us since the *ante-constitutional* period.

Shall no treaties of commerce be held to be the law because intruding on the power of Congress to regulate commerce? Is congressional action requisite for every treaty concerning commerce, or tonnage dues, or rates on vessels or their cargoes depending upon stipulated circumstances? If so, in a century of treaties, nearly every treaty has infringed on the constitutional powers of Congress, and consequently was unenforceable in our courts, and a *sham* among the nations of the earth.

In the light of precedent, authority and history to argue now that treaty provisions like those under consideration require the action of Congress to become operative is an obvious and unworthy afterthought.

As far as the treaty with Denmark required congressional action, it was had March 4th, 1858, when the $400,000 was appropriated to make the stipulated payment to Denmark, provided for by its Article V., securing the abolition of the sound dues.

11 *U. S. Statutes at Large*, 261.

XVI.

Other considerations in support of the points made in this brief and enlarging thereupon, after examination of the Government brief to be filed in answer hereto, are desired to be submitted by a reply brief in association with the counsel who are to be heard orally in behalf of the plaintiffs in error.

It is respectfully submitted that the judgment below should be reversed.

Dated No. 167 Broadway, New York, April, 1887.

TREMAIN & TYLER,
In behalf of Plaintiffs in Error.

A. J. Willard
Of Counsel

122-116

APR 27 1887
JAMES H. MCKENNEY,
CLERK.

Supreme Court of the United States.

THOMAS W. BARTRAM and Another

against

WILLIAM H. ROBERTSON, Collector.

Argument of Counsel for Plaintiffs in Error.

A. J. WILLARD.
H. E. TREMAIN.

LIVINGSTON MIDDLEDITCH, Law Case Printer, 26 Cortlandt St., New York.

Supreme Court of the United States,

OCTOBER TERM, 1886.

No. 275.

THOMAS W. BARTRAM and JOSEPH B. BARTRAM,
Plaintiffs in Error,

AGAINST

WILLIAM H. ROBERTSON, Collector of the Port of New York,
Defendant in Error.

Argument of Counsel for Plaintiffs in Error.

The questions presented are in substance:

I.—Whether the merchandise mentioned in the complaint, as claimed to be dutiable by the defendant in error, is embraced in Article IV. of the Danish Treaty.

II.—Whether the intention of Article IV. was that merchandise of the nature stated, and circumstanced as represented in the complaint, should be exempt from duties.

III.—Whether in respect to that intention Article IV. is self-executing, so as to deprive the defendant in error, in a proper case, of authority to demand the duties of which complaint is made.

IV.—Whether the treaty with the Hawaiian Islands, when operative, constituted the condition upon which merchandise of that nature, and so circumstanced, was to be exempt from duty.

V.—Whether the force and effect of Article IV. has been impaired by any action of Congress.

(See notes appended.)

I.—The first question is answered by the record (fols. 10, 18, 21, 23), where it is stated, and admitted by the demurrer, that the merchandise in question was of such character and description that had it been imported from the Hawaiian Islands "would have been admitted to the ports of the United States free of duty under said Hawaiian Treaty and Act of Congress," and was the produce of the dominions of the King of Denmark, imported into the United States from St. Croix, a Danish possession in the West Indies.

II.—To reach the intention of Article IV., it is necessary to examine it in its relation to the treaty as a whole, from which we will be enabled to gather both the general objects and purposes of the treaty and the specific and exact intention embodied in that particular article. See notes a + d,

The Danish treaty was a product of a broad and generous policy in the intercourse of the United States with foreign nations that at once excluded favoritism among those nations, replacing it with the strictest impartiality and friendly reciprocity, thus avoiding the complications of European diplomacy and releasing commerce, navigation and the revenues of the country, from dependence upon the variable phases of international politics.

The earliest history of the American negotiations for commercial advantages to result from treaties illustrates the spirit and design of the foreign policy of the United States in these respects. The treaties which, in fact, were made from time to time, exhibit the consistency with which this policy was uniformly pursued, and in many instances successfully established.

Early in the history of the efforts of the Committee in charge of foreign affairs, which was appointed by the Continental Congress, may be traced the efforts of the sagacious leaders of that period to fix in explicit terms the advantages and equalities desired for American shipping and American cargoes in all parts of the world. The advantages which the United States, by reason of its geography and resources, offered to the trade and commerce of foreign nations, were relied upon as the great consideration to induce them to adopt the most liberal basis of equality and reciprocity in all matters relating to navigation and commerce. While it is true that this policy became more successful after the war of 1812–15, it is nevertheless noteworthy that it was in exceptional

instances specially successful in some of our earliest treaties. That it was not successful in the conclusions established by the treaties from time to time made between this country and Great Britain is not strange, especially in view of the relations of the commerce between the mother country and her numerous valuable colonies in the East and West Indies. The influence of Great Britain upon the foreign policy of other nations, notwithstanding their interest in concluding with the United States liberal conventions, also retarded the successful accomplishment in more than one instance of the negotiations of our earliest statesmen.

In all the diplomatic efforts made on our behalf, during the first generation of the history of this government, it is very clear that two things at least were aimed at: One was the entry and departure of American vessels in all the ports and dominions of the foreign country with whom a convention was sought, upon as favorable terms as were accorded by that power to any other foreign nation, with a reciprocal equivalent concession by the United States to the vessels of the contracting country: and secondly, the exportation of the products of the United States into the dominions of the foreign sovereign with no higher or other duties than were chargeable by that sovereign to any other foreign nation, with the equivalent reciprocal concession that the United States would not impose upon the products of dominions of the contracting power any higher or other duties or charges than were imposed on the like products of any other foreign country. It goes without saying, that, in addition to these objects sought to be attained, there were the more general purposes of freedom of travel and protection of person and of property in the respective dominions of the contracting powers. These latter reciprocities of amity and of protection of person and of property in the dominions of the respective parties were in general successfully and satisfactory introduced into all the early conventions to which the United States was a party, and were readily agreed upon in satisfactory terms between our representatives and the representatives of the powers which were willing to enter into conventions with the United States. The substantial difficulties to be overcome, however, in the treaties bearing more directly upon commerce, related to the proposed equality and reciprocity in the carrying trade and to the proposed reciprocal exchange of the products and resources of the parties to a convention.

In illustration of the foregoing, reference may here be made to

the treaty with France of February 6, 1778. The terms expressed by the language of its articles 1, 2, 3, 4 and 5, are significant and instructive (1 Ell. Dip. Code, 36). This treaty is alluded to by Secretary of State, Adams as being "to the foundation of our commercial intercourse with the rest of mankind what the Declaration of Independence was to that of our internal government." The preamble is spoken of as "the corner stone of our subsequent transactions of intercourse with foreign nations," and the first four articles, as containing "the practical exposition of those principles which may serve as models for insertion in the projected treaty, or in any other that may be hereafter negotiated with any of the rising republics of the South."

By article two of this treaty, the parties "engage mutually not to grant any particular favor to other nations in respect of commerce and navigation which shall not immediately become common to the other party, who shall enjoy the same favor, freely if the concession was freely made, or on allowing the same compensation, if the concession was conditional." This is the clause that is generally referred to as being the "favored nation" clause. It is open to criticism for vagueness and laxity, and has never been accepted on the part of the United States as comprehending all that was desired. Our foreign representatives have frequently been so instructed and urged to procure more explicit and useful stipulations—such stipulations for instance as were engrafted in articles 3 and 4 in this treaty with France of 1778.

Thus, article 3 provided that French subjects shall pay in the United States "no other or greater duties or imposts of what nature soever they may be, or by what name soever called, than those which the nations most favored are or shall be obliged to pay," and by article 4 reciprocal advantages were given to United States citizens, with the single exception to these mutual exemptions, of a certain duty which was to continue as expressed in article 5.

These articles, 3 and 4, probably represent the earliest use of the term "no other or greater duties" exhibited by our diplomatic history.

That the general provision conceding the most "favored nation's" privileges, as expressed in article 2 of the French Treaty of 1778, has never been deemed satisfactory by the United States is further evinced by the incorporation of more explicit and direct stipulations in many of the treaties negotiated in our early diplo-

matic history, as well as in later treaties and the official expressions of the negotiators.

Count de Vergennes in acknowledging to Franklin (4 *Dip. Corres.*, 210–211) the communications of Congress that "the United States will in no case treat any other nation, with respect to commerce, more advantageously than the French," says: "This disposition is much the wisest, as it will prevent those misunderstandings which might arise from *the equivocal terms*" in which article 2 of the Treaty of 1778 is conceived. Congress had instructed Dr. Franklin to cause the French King to be assured that it would "be our constant care to place no people on more advantageous ground than the subjects of his Majesty."

Another illustration of the United States policy to fix the relations of foreign commerce in unequivocal terms, and upon ascertainable conditions, is exhibited in the negotiations for the Treaty of November 19, 1794, with Great Britain, and in the provisions of the treaty itself. It will be observed that in the *project* submitted by Lord Granville the idea of favor to nations was expressed, while in the treaty as finally agreed upon that idea is excluded. Inasmuch as the instructions to our minister John Jay were to avoid the use of the expression "favored nation," as leading to "embarrassments" it must be assumed that the correction of the project, in this respect, was in consequence of such instructions. The provision as finally agreed upon was as follows:

"Article XV.—It is agreed that no other or higher duties shall be paid by the ships or merchandise of the one party in the ports of the other than such as are paid by the like vessels or merchandise of all other nations. Nor shall any other or higher duty be imposed in one country on the importation of any articles the growth, produce or manufacture of the other than are or shall be payable on the importation of the like articles being of the growth, produce or manufacture of any other foreign country. Nor shall any prohibition be imposed on the exportation or importation of any articles to or from the territories of the two parties respectively which shall not equally extend to all other nations."

It thus appears that the expression "favored nation," found in Article 3 of the French treaty, is omitted from the corresponding article in this treaty of 1794 under instructions exhibiting the policy of the United States.

The object of this instruction was clearly to avoid the "embar-

note 4.

rassments" that might arise from the claim that the reduction of the duties demanded from a third nation might not be on the ground of favor, but for a full compensation, and in that case it might be contended that a nation so situated could not be called a favored nation, and a reduction of duties in its favor would not lead to the reduction of the duties of a treaty nation having a favored nation clause. This is clearly the "embarrassment" to which the instruction relates. The object of the instruction was, then, to make the duties payable by a treaty nation depend upon the duties actually levied upon other nations without regard to whether the motive of a reduction to such nation was favor or compensation. This policy was fully embodied in Article IV of the Danish treaty, and has been embodied in every treaty negotiated by the United States since 1794, to which the United States has been able to procure the assent of the contracting power. note e

A succinct review of our diplomatic history down to 1839 will be found in a report of the Secretary of State to the first session of the 26th Congress. (Senate Doc. 58 to 123.) The statements there made "show that in 1793 our commercial intercourse rested upon the vague and insecure basis of the most favored nation. In 1815 it was advanced to the more liberal footing of (1) equality of tonnage duties on our ships with that of national vessels; (2) equality of duties on cargoes, whether imported or exported in United States or national vessels; and (3) equality of duties on productions of the United States with those of similar productions of other countries; but was still restricted to the trade in the products of the respective countries, or the direct trade. In 1825 it reached a higher point, the trade in all kinds of produce, without regard to origin,—that is, the indirect trade—being opened upon the same principles of equality which previously governed the direct trade. That twelve of the nations with which by treaty we have commercial interests, viz.: * * * Denmark, * * * have adopted the most liberal basis of equality of duties on navigation and commerce in the indirect trade." That five of them, Great Britain, France, * * * have adopted the principle of equality of duties, but still adhere to the direct trade. The treaty with France, however, differs from those of other powers. It contains no stipulation securing to the products of the United States admission on the footing of like articles from any other foreign country. A discrimination to our prejudice between the duties

lying on our cotton and the like article coming from
places in fact exists, and has been made the subject
remonstrance hitherto without effect; and that nine po
* * are left free to deal with our commerce at will w
other check than our counter-vailing Legislative provisi
document, and the treaties it refers to and the starist
panying it denote how far the objects sought to be o
our earliest statesmen had in fact been explained, an ob
less fairly outlined in the opinion Benjamin Franklin
when he wrote to Mr. Livingston thus: "I feel mysel
inclined to believe that a State which leaves *all her po*
all the world upon equal terms will by that means ha
commodities cheaper, sell its own productions dearer
the whole the most prosperous." (4th Dip. Corr. of
p. 140).

Some light is shed upon the treaty between the Un
and Denmark of 1826 by the statement of the fact t
based upon the example exhibited in the Central Amer
of December 5th, 1825, and by a statement of the earli
tions and treaties [redacted] between Denmark and the Unit
On February 22d, 1783, before any treaty had been p
Denmark on behalf of the United States, or any negot
that purpose opened, the Danish minister of forei
wrote to his representative in Paris to gain there "a
possible the confidence and esteem of Dr. Franklin."
expressing satisfaction at the "glorious issue of this w
United States of America" * * * "how fully we are
that it will be for the general interest of the two States
soon as possible reciprocal connections of friendship
merce," and as the "shortest way of accelerating thes
nections" would be to take the treaty between the Congr
States-General for the basis; and hoping that "Dr. Frank
communicate to us his ideas on the changes or additi
he might think reciprocally useful in the treaty of comm
Congress might conclude with us. We should eagerly ar
respond to such overtures * * *" (4th Sparks Dip. C
fore anything had come out of this letter, the treat
the United States and Sweden was concluded in March, 1
printed in public journals of Congress, Vol. 4, p. 241, u
of July 29th, 1783. (See 4 Sparks Dip. Corr., p. 76,
plan was proposed to Denmark through Franklin base

treaty with Sweden (Ib. p. 110), to whom a counter project from Denmark was sent July 8th, 1783, differing, in Denmark's estimation, in nothing essential from the project already offered. (Ib., p. 115.)

In reply to Rosencrone Franklin (1783) transmitted for his consideration "such a sketch as you mention formed on the basis of our treaty with Holland," on which he would be glad to receive his Excellency's sentiments. This Holland treaty was on the plan proposed by Congress for a treaty with Sweden. (4 Dip. Corr., pp. 97–99.)

For an illustration of the use of the term "no other or higher duty," see treaty (1783) with Sweden, 1st Elliott's American Dip. Code, p. 170, Articles 3 and 4; and the same explanation in 4th Dip. Corr. Am. Rev., pp. 116 and 130.

In this counter project of Rosencrone for Denmark is found the following article (4th Dip. Corr. pp. 116, 117):

"The subjects of His Majesty the King of Denmark and Norway may frequent the countries and latitudes of the United States, reside and traffic there in all kinds of merchandise and effects, the importation or exportation whereof is not or shall not be prohibited, and in all places where navigation or commerce are not or shall not be reserved solely for the citizens of the United States; and they shall not pay in the ports harbors, roads, countries, islands, cities and places of the United States, other or greater duties or imposts of any kind or denomination whatever, than such as the most favored nations pay or shall pay. They shall moreover enjoy all the rights, liberties, privileges and exemptions with respect to trade and navigation and commerce which the most favored nations do or shall enjoy, and they shall also conform to the laws and ordinances which the said nations are or shall be bound to observe, whether in passing from one port to another of the dominions of the said States, or in returning from any part or to any part of the world whatever." Article 3 contains a reciprocal agreement for Americans.

In the course of explaining this project it was said:

"The second and third articles will regulate the conduct of the reciprocal subjects in the respective States. Taking things as they now are it is easily perceived that the stipulations of the said articles, although apparently reciprocal, give, however, superior advantages to the United States. For according to the system of

commerce which subsists in Denmark and Norway, the most favored nations pay there no greater imposts or other duties than the proper subjects of the State, and the proper subjects of the State enjoy considerable diminutions with respect to unprivileged nations as well for their vessels as their merchandise. It is evident therefore, that the subjects of the United States of America being received among most favored nations in Denmark and Norway, would not only *gain by that means* a competition with the said most favored, but *also a preference over several other nations* even in the neighborhood of Denmark with whom no treaties of commerce have been concluded, and who, therefore, are still in the number of unprivileged as to navigation and commerce in the states of his Danish Majesty. On the other hand, if the advantages which would result from these articles as to the commerce of the subjects of Denmark in the territories of the United States are considered, the said advantages would be confined to the simple competition with every other foreign nation; but as there is no nation that we know of which actually pays in the territories of the United States other or greater duties than what the privileged or most favored nations are bound to pay, the Danish subjects would not find in the territory of the United States the same preference which the subjects of the United States would obtain in Denmark and Norway. The preceding considerations are not advanced for the purpose of taking any advantage, but they are pointed out only to show the impartiality and good will with which we desire to contribute to the mutual connections of amity and commerce between the two nations who will, it is to be hoped, more and more unite * * * ".

It is thus obvious that treaty privileges contracting for "*other or greater duties*" originally contemplated, of necessity, appropriate reference to duties exacted on importations from other countries. Such reference was essential to give value, substance or effect to the treaty stipulation. It was a fact to be ascertained. Upon the fact, whatever it was, depended the substance and value of the treaty stipulation. The privilege not only was dependent on reference to the fact as to what duties were imposed on the products of any other nation, but the privilege necessitated such reference and was conditional upon it. It was indeed valueless as a treaty right unless immediately measureable by the duty assessed on importations from other countries. The clause meant that importations should not be privileged at a lower duty from any

foreign country than should be laid upon the importations from Denmark. This was the end and scope of the advantages offered to the United States in the exportation of its products to the dominions of Denmark. If Denmark did not admit United States products upon the payment of duties no other or higher than those charged by Denmark on the products of any other foreign country, there would be a violation of the treaty. If the United States should charge Danish products beyond what it charged the like products of any other foreign country, the United States would violate the treaty. What other meaning can be assigned to clauses of this character?

One of the important objects, especially in the minds of our early statesmen, that induced treaty provisions of the character in question was the West India trade hoped for through the successful negotiations of such a provision in treaties with France or with Great Britain. That the clause in question was not finally included within treaties with the great commercial powers does not detract from its significance when found in the other treaties.

In 1782, Robert R. Livingston wrote to Franklin, in speaking of the subjects for discussion in negotiations with England and France:

"Two things are of great moment to us, one of which, at least, would meet with no difficulty if France and England understood their true interests; I mean the West India trade, and the right to cut logwood and mahogany. *Without a free admission of all kinds of provisions into the islands our agriculture* will suffer extensively. This will be severely felt at first, and when it remedies itself, which it will do in time, it must be at the expense of the nations that share our commerce. *It will lessen the consumption of foreign sugars*, etc., * * *" (4 Dip. Corr., p. 13).

So when these clauses failed he wrote again (Ib. 13), in 1783: "I am sorry that the commercial article is stricken out; it would have been very important to us to have got a footing at least in the British West Indies as a means of compelling France to pursue her true interest and ours by opening her ports also to us."

It was in pursuance of these views that clauses of the character in question were inserted whenever practicable. Thus, when Franklin at that time sent home the Plan of Treaty with Portugal it contained the usual provision against no "*other or greater duties* or imposts of any kind whatever than such as the most

favored nation are or shall be obliged to pay." See its article III. (4 Dip. Corr., p. 151). note e

It is apparent from the foregoing review that it was the definite policy of the United States from the foundation of the government to induce the governments of Europe having colonial possessions in the West Indies to place the commercial relations between the United States and such colonial possessions upon the same footing as obtained between those powers and the United States in relation to their European territories. It also appears that this policy was defeated by the refusal of such powers to accede thereto, until Denmark by the treaty under consideration conceded that her colonial relations with her West India possessions should constitute no exception to the rule of equality and reciprocity accepted by the home government, as it regarded commerce between the United States and her West India possessions.

For further illustration of this policy see the views of the United States representatives in respect to the British West India trade stated in 2 Elliott's Dip. Code pp. 573, 578, 579; and instructions (1823) preceding the Central American Treaty of 1825 Ib. pp. 649–657.

The principle of the Danish treaty as exhibited by Denmark's concession with regard to her colonial possessions appears to be that the most intimate political and commercial relations between the contracting parties and any other nation or peoples should constitute no exception to the rule of equal advantages, measurably by the advantages conceded to others. As the relation between a parent country and its colony is the most intimate politically and commercially that can exist, it is very clear that no condition of reciprocity of a character inferior to that should be allowed as such an exception.

The relations between the United States and Hawaiian Islands prior to 1875 rested on no intimacy, political or commercial, and furnished no ground for an exception to the rule of equal advantage. Notwithstanding the intimate relations between Denmark and her colonies she submitted to complete equalization. The United States can do no less.

Considered in the light of the purpose which has been assigned to the treaty as a whole, the interpretation of Article IV. is neither difficult nor doubtful. As a distinct article, separate and

apart from all general expressions as to favor to other nations, it simply negates the performance of certain official acts upon certain conditions therein specified. The condition is that the lowest duties or immunities from duties conferred upon any nation shall constitute the measure of the duties imposed on the treaty powers as well as the right to demand any duties whatever; and it negates the right to collect other or higher duties in respect to the treaty powers than such as are justified by such standard.

The general intention of the treaty was to propound a variable rule of conduct for the parties that should from time to time embody the largest concessions made by either party to any other power, as part of its provisions. Inasmuch as a process of equalization under the provisions of such a rule of conduct would in many instances demand the intervention of the political power, and as the demands of commercial intercourse as affecting individuals ought to rest upon the basis of judicial decision the Article IV., having relation to such case, placed the rights of commercial intercourse upon facts accomplished that might be judicially discerned rather than upon the issue of diplomatic intricacies incapable of certainty and easy solution.

Unless these principles are recognized and applied to the Danish treaty of 1826 all of its provisions relating to commerce and navigation are practically valueless. This observation may be extended to all other United States treaties on the same subject.

That which constitutes the element of progress of the greatest value in international intercourse is the replacement of war as a means of adjustment by judicial remedies; and if a construction recognizing and embodying this principle is rejected a step backward towards the barbaric arbitrament of war must be taken.

III.—Having ascertained the proper intention of Article IV., it becomes necessary to consider the means by which that intention may be effectuated.

One view of this subject is that the only means of enforcement to which the individual can resort, where unjustly deprived of the benefit of such treaty provisions, is to the sovereign authority for the exercise of a power that can only produce, either the annulment of the treaty, retaliatory measures or armed enforcement. Another view is that such provisions, from their inherent nature,

pass into the condition of municipal law, and thus are brought within the means of national enforcement possessed by the courts of justice.

The Constitution of the United States has facilitated this transformation of treaty stipulations into municipal law by the declaration that the treaties of the United States shall be the "supreme law of the land," a declaration that emphasizes a step of progress from the arbitrament of force to that of reason.

We submit that it will be found to be true, as a general proposition, that regulations of commerce and navigation by treaty stipulations are habitually treated as features of the municipal law. That it should be so is a necessity of the fact that such regulations primarily affect individual interests, and only indirectly national interests; and individual interests can only be adequately secured through the adjustments of municipal law and the consequent means of judicial enforcement. See note b

The result is that treaty provisions, regulative of commerce and navigation, must be presumed to intend to propound a municipal law, and that presumption can only be rebutted by finding an express declaration or necessary implication that dependence upon the political power is intended.

The elaborate efforts of the United States to suppress, in the class of provisions to which Article IV. relates, an expression that seems to imply a necessity for political discrimination in its application, evinces the clearest intent to give to such provisions the full and perfect character of municipal law. See 2 Wheat. Dig. p. 38

The separation of questions of commerce and navigation, as affected by duties and imposts, from all other topics, involving more or less recourse to political intervention, and placing them by themselves, and embodying them in language exact and explicit, from which every intimation of political discretion is excluded, and surrounding them with conditions capable of judicial ascertainment, further demonstrates the specific design to place the rights of individuals, under international regulations of commerce and navigation, upon the solid basis of law and judicial decision.

We submit that treaty stipulations, having the force and effect of municipal law, are inherently self-executing, and, if made otherwise, must be so made by express declaration, or by the intervention of some condition depending wholly on political discretion. For instance, the measure of *favor* to be ascertained under a gen-

eral favored nation clause, from its nature involves political discretion; whereas, a measure depenedent upon what is the law affecting any other nation, as to its imports into the United States, involves, simply, a question of law, determinable by the Courts.

Hence the questions arising under Article IV. are in their nature judicial; and no expression exists in that article or any portion of the treaty to change that character. The duties or exemptions demandable under that Article must, therefore, be determinable in the Courts.

See note C.

IV.—The only argument which has been advanced denying that the treaty made with the Hawaiian Islands fulfills a condition of Article IV. is in substance that there was something in the relationship, political and commercial, between the United States and the Sandwich Islands that rendered that relation an exception to the provisions of Article IV. However intimate those relations may be regarded, they certainly were not as intimate as those existing between Denmark and her colonies. The diplomacy of the United States excluded that intimacy from constituting an exception to the rule of equality, and, therefore, the United States is not in a position to urge its intimacy with the Sandwich Islands as ground for such exception.

But it may fairly be doubted whether the traditional relations of the United States to the Sandwich Islands may be regarded as "intimate." From the time that Captain Cook became familiar with the internal institutions of those islands, Hawaii does not figure in our diplomatic history. Indeed, it will be learned from the discussions in Congress upon the adoption of the enactment of 1876, that one of the chief obstacles in the way of its adoption arose from the political status of the Hawaiian Government as a small and isolated community, unconnected with the policies of the great political and commercial states.

The question there appeared to be as to the inauguration of an intimacy under very unequal conditions politically and commercially, and not as to a measure demanded either upon grounds of benevolence or policy arising from any antecedent relation between the contracting parties.

It is apparent that at the time the Hawaiian treaty was negotiated the United States sustained no relations with the Hawaiian Government different from those existing with all other powers,

excepting that they were less intimate than those existing between the United States and the great commercial States.

The question presented is then resolved into the enquiry whether, under Article IV. of the Danish treaty, the United States were capable of taking into its intimacy and commercial favor an independent nation with whom it had never before sustained such relations, and conferring upon such nation special commercial privileges and exemptions without conferring a similar right upon the Danish Government. The answer attempted to this, that a treaty of that nature contains a feature of reciprocity not common to all other commercial treaties is an attempt to erect a word into a thing.

Reciprocity is a necessary characteristic of all commercial treaties based on fair considerations, and hence every fair commercial treaty is a reciprocity treaty.

The provisions of Article IV. were intended to exclude discriminations based on degrees of reciprocity. Hence, to affirm reciprocity as the character of the Hawaiian treaty is to subject it to the exclusions and inclusions of that article as it regards degrees of reciprocity.

It was the discriminations based on degrees of reciprocity, such as appear in the Hawaiian treaty, that it was the explicit object of Article IV. to secure for the advantage of the contracting powers.

The just and only conclusion possible is that the Hawaiian treaty constituted the condition under which the discriminations in favor of the Hawaiian Islands became available to the Danish power, and the law of the Hawaiian treaty became part of the Danish treaty.

V. We do not deem it necessary to discuss the competency of Congress to release the citizen from the effect of treaty stipulations; but it certainly cannot release the United States from any obligation imposed upon it by a treaty with a foreign nation executed in the manner provided by the Constitution

We submit that according to the course of decisions rendered in this Court no act of Congress can be allowed to have the effect to violate the treaty obligations of the Government, unless such an intention appears distinctly and explicitly in the act itself, or unless the act is of such a nature as to be without efficiency, unless such an effect upon treaty obligations is accomplished.

In other words, an act of Congress cannot be regarded as impairing the obligations of a treaty unless it is so declared in express terms or arises from necessary implications.

On the other hand, an Act of Congress may repeal a prior act upon the ground simply that according to its reasonable implications, it is inconsistent therewith. It was the failure to note this distinction that led the Circuit Court to obvious error where the authority of an Act of Congress to repeal the obligations of a treaty as affecting the citizen, was placed on the same footing as that of its repeal of an antecedent statute. This principle, conservative of contract obligations, was forcibly expressed by Mr. Justice Clifford in *the Twenty-five per Cent. Cases* (20 Wall., 179-187) in its application to the contracts of the government with its employees, and again by this Court in the case of the *Chicago and North Western R. R.* v. *U. S.* (104 U. S. p. 680) in its application to the postal contracts of the government, where the rules of interpretation as above stated were recognized and applied. As this rule rests upon broad principles of justice, it necessarily includes obligations of the highest sanction, involving the national faith.

We shall not argue a proposition so plain and obvious the solution of which rests in the sense of justice rather than in technical considerations.

The question of the effect of subsequent legislation upon the treaty involves the consideration first of the tariff laws subsequent to the treaty and prior to Sept. 9, 1876, and second, the act rendering operative the Hawaiian treaty.

It has already been stated by us that the tariff acts prior to the Hawaiian treaty were all consistent with the Danish treaty and precisely such as its language and intention call for, no discriminations being made of the nature contemplated by the Danish treaty. If, then, the legislation under consideration just referred to was in entire consistency with the provisions of the Danish treaty, they contain nothing possible of operation by way of repealing those provisions. The United States engages to pursue a certain course of impartiality. It strictly conforms its legislation to that engagement until special privileges were conferred by the legislation of 1876. It is impossible to discover any means by which such a course of action could operate to repeal the obligation with which it was consistent.

There being then no inconsistency between the legislation prior to the Hawaiian treaty and the Danish treaty, there is nothing that could operate to repeal the latter as a part of the municipal law of the land.

It only remains to enquire whether the Hawaiian treaty and the

act of Congress rendering it operative contains anything tending to impair the obligation of the Danish treaty.

The Danish treaty contemplated the happening of the very contingency that occurred with the enactment of the Hawaiian treaty, and provided certain consequences that should arise upon the happening of that contingency. See note 9.

How then can the happening of the contingency operate to prevent the consequences previously attached to it? The statement of the question furnishes its own answer.

The whole scope of the Hawaiian treaty and act rendering it operative, was the conferring a special privilege upon the Hawaiian government; and that privilege is neither described nor intended as an exclusive privilege, so as to exclude the United States from pursuing its uniform policy of equalization with other nations. All that was conferred upon the Hawaiian government by that treaty and act can be fully enjoyed even if its privileges are extended to the Danish government. It cannot then be said that the Hawaiian treaty and act depend for their efficacy upon anything tending to impair the treaty obligations with Denmark. Consequently, no repeal of the Danish treaty is a necessary result of the enactment of that treaty and of the law that gave it operation.

If what has been stated receives favorable consideration, it must be concluded that the Danish treaty was the product of a broad and generous policy, consistent with that impartiality that appertains to the advanced conception of a government of law embodied in our natural institutions, and of the still higher principle of justice and fraternal relationship upon which all that is hopeful in the future of international relationship must depend.

This broad conception, early grasped by our leading statesmen, was embodied in the diplomacy of our country and in its legislation, both of which aimed at the cementing of fraternal relations among the nations, which can only be attained by applying the principles of impartial justice. Such wise counsels, earnestly persisted in, produced the class of provisions of which the IV. Article of the Danish treaty is an instance.

Whether the Hawaiian treaty is to be regarded as the first step of a political conquest, or an advantageous monopoly of trade, or a sentimental effusion, it was equally a departure from the estab-

lished policy of the government, unless it can be harmonized, as it may be, with existing treaty obligations.

The question submitted to this Court to-day is whether that precedent shall be converted into a policy hostile to our national policy, as hitherto pursued, and our international obligations, or shall be harmonized with that policy and with those obligations.

It must be admitted that on the face of the treaty and the act of Congress there is an absence of evidence that any idea was entertained inconsistent with existing treaties. This Court is called upon by the defendant in error to discover and to declare a lurking intention of that dishonorable character.

As the existence of such an intention will tend to bring dishonor to the Government for disregarding its solemn treaty obligations, and also reversing and revolutionizing our foreign policy, it is impossible that such a result should flow from the exercise of the powers of this Court. Hence the efficacy of the Danish treaty must be maintained and the judgment below reversed.

A. J. WILLARD,
H. E. TREMAIN,
Of Counsel.

NOTES APPENDED TO PLAINTIFFS' ARGUMENT AND BRIEF.

a. "Compacts between governments or nations, like those between individuals, should be interpreted according to the natural, fair, and received acceptation of "the terms in which they are expressed." 2 *Wharton's Digest International Law, p.* 33, *citing U. S.* vs. *d'Autervie*, 10 *How.*, 609.

In the fulfillment of treaty stipulations a liberal spirit should be observed. *U. S.* vs. *Auguisola*, 1 *Wall.*, 352. "That construction most favorable to its execution, as designed by the parties, will be preferred." 2 *Whart., p.* 34.

b. Secretary Webster: "In all regular governments questions of private right arising out of treaty stipulations are, in their nature, judicial questions." Besides many instances in United States courts that might be quoted, "similar instances of judicial decisions on points arising under treaties may be found in the history of France, England, and other nations." *Ibid, p.* 29.

c. Instances exist of United States *statutes* more or less dependent for their application and use upon the action of *foreign* governments. Thus the retaliatory navigation law of 1817 laid the direct trade of foreign bottoms in goods of their own country, when not in reciprocity, under a discriminating duty. In a proper case the application of the statute was judicially ascertained and the result adopted by the Treasury Department. (Treasury Circular, November 6, 1847.) Indeed, it has been said that the case of the *Ship Recorder*, 1 *Blatch.*, 218, in this respect brought about reciprocity by the repeal (1849) in Great Britain of her navigation laws (12 and 13 Vict. Ch., 49).

The conditions of the Danish treaty depend only upon United States laws, the conditions of discriminating statutes upon foreign laws. Both are equally subject to direct judicial fulfillment.

d. The methods of interpretation incidentally expressed by John Adams are noteworthy:

"As contemporaneous exposition is allowed by all writers on the law of nations to be the best interpreter of treaties, as well as of all other writings;" and as the particular treaty on which he was writing had never received such a construction as he was then resisting, nor had prior treaties, and as "the interrupted practice had been against such a construction," it cannot be "attempted now with any prospect of success." See 4 *Spark's Diplomatic Corrs., Am. Rev.*, p. 276.

So, in the case at bar, no other construction and application of the Danish treaty except as contended for by plaintiffs is consistent with contemporaneous exposition, prior treaties, history, or manifest intention.

e. In the beginning of our history the colonial policy of European nations and their navigation laws had left to foreigners no other than an indirect trade with colonies through the mother countries. This government sought to break through that colonial policy and to secure to our flag reciprocity and liberty of trade. We succeeded

only after a long struggle in securing from some European powers recognition of the equalization sought for.

(1.) The fourth article of the Danish Treaty of 1826, was one of the first European provisions of this character, that stated in more direct and explicit terms what had been sought to be accomplished by the use of such language as is found in the French treaty of 1778 above quoted.

Between 1778 and the Danish treaty of 1826 stipulations corresponding to Article IV will be found in treaties between the United States and European powers: in treaties with Netherlands, 1782; Sweden, 1783; Prussia, 1785, and Great Britain in 1794 (abrogated). The improved language selected in 1826, however, had been used in the treaty with Central America (1825), and in treaties with several minor States. The object of these early European treaties has been recently thus stated: To place "each of the other powers in respect of commerce and navigation within each and every State on the footing of the most favored nation; and it was agreed with Prussia that the ports of each power should be open to the other, and that the *duties*, charges, and fees to be imposed by each *upon articles the growth*, produce, or manufacture *of the other* should be *only such as should be paid by the most favored nation.*" *Davis' Notes to 2 Whart. Int. Law Dig., sec.* 148. The Danish treaty of 1826 has the same meaning; otherwise the careful stipulations of Article IV are insignificant and worthless.

(2.) In a *projet* for the Prussian Treaty, sent to Congress by John Adams in 1784, there was a provision whereby merchandise, particularly linens, &c., shall not pay "other or heavier duties in the United States" than what similar merchandise of the most favored nations pay in the said States on entry and exportation, "and that American rice and tobacco going into Prussia should enjoy certain exemption." (2 *Dip. Corres., p.* 111.) But the enumeration of particular products was neither favored nor essential, as the general expressions, equivalent to those used in Article IV of the Danish treaty in question, were capable of no other reasonable construction than to secure reciprocity and equality of traffic in native products. Such general expressions resulted from the negotiations and occur in the Prussian Treaty of 1785.

f. Secretary CLAY wrote (2 Wharton's Dig. Int. Law, page 38) in 1825 that the rule of the most favored nation, besides being usually an unequal one, is not so simple as a treaty of *reciprocity*. "In order to ascertain the quantum of favor which, being granted to the commerce and navigation of one nation, is claimed by another in virtue of a treaty-stipulation embracing that principle, it is necessary that the claimant should be accurately informed of the actual state of the commercial relations between the nation on which the claim of equal favor is preferred and all the rest of the commercial world. A knowledge of those relations must be sometimes sought after in numerous treaties, statutes, orders, decrees, and other regulations, and is often of very difficult attainment."

Secretary ADAMS (*Ib.*) thought such a clause covered only gratuitous favors. These were some of the obvious "embarrassments"

sought to be avoided by the United States in the instructions to avoid the use of the expression "favored nation," and which were escaped by the use of the unambiguous terms of no "higher or other" duties beyond those paid on the products of any other country.

Hence in all the United States treaties since 1794 whenever the topic of tonnages, charges, or duties on the products of the contracting parties are mentioned the expression "favored nation" is not used in the statement of any substantial reciprocal stipulations.

The latest illustration is afforded in the Tonga treaty sent to the Senate in February, 1887, by the fourth article of which it is provided that no customs duty shall be charged on the products or manufactures "of one country when imported therefrom into the other country, other or higher than is charged upon the same, the produce, or manufacture of, or imported from any other country." Here is neatly expressed the design and meaning of our treaty stipulations on this topic. They are all reciprocity treaties; and so is the Danish treaty, the true meaning of which is aptly restated in this Tonga treaty.

g. The creation of a special free list exempting from duty the particular products of a treaty power is exactly the condition subsequent upon which stipulations like Article IV of Danish treaty become immediately operative. Hence such special exemptions have been stoutly resisted by many of our statesmen. In discussing the recent Mexican treaty Senator MORRILL is quoted as saying: "If any production of one nation is subjected to a less duty than that imposed upon a similar production of some other nation, no matter whether the difference has been brought about by legislation or by treaty or by both combined, it would seem to be a substantial violation of all compacts which set forth that 'no other or greater duties shall be imposed than those which are paid upon the productions of the most favored nation.' Every fresh example in the line of a possible future settled policy of select and special favoritism will be found dangerous and in conflict with our plighted faith." * * *

Bartram *v.* Robertson, Oct. Term, 1886, No. 275.

A. J. WILLARD,
H. E. TREMAIN,
Of Counsel.

122-116

FILED
APR 26 1887
JAMES H. McKENNEY
CLERK.

In the Supreme Court of the United States

OCTOBER TERM, 1886.

THOMAS W. BARTRAM AND JOSEPH B. Bartram, plaintiffs in error,
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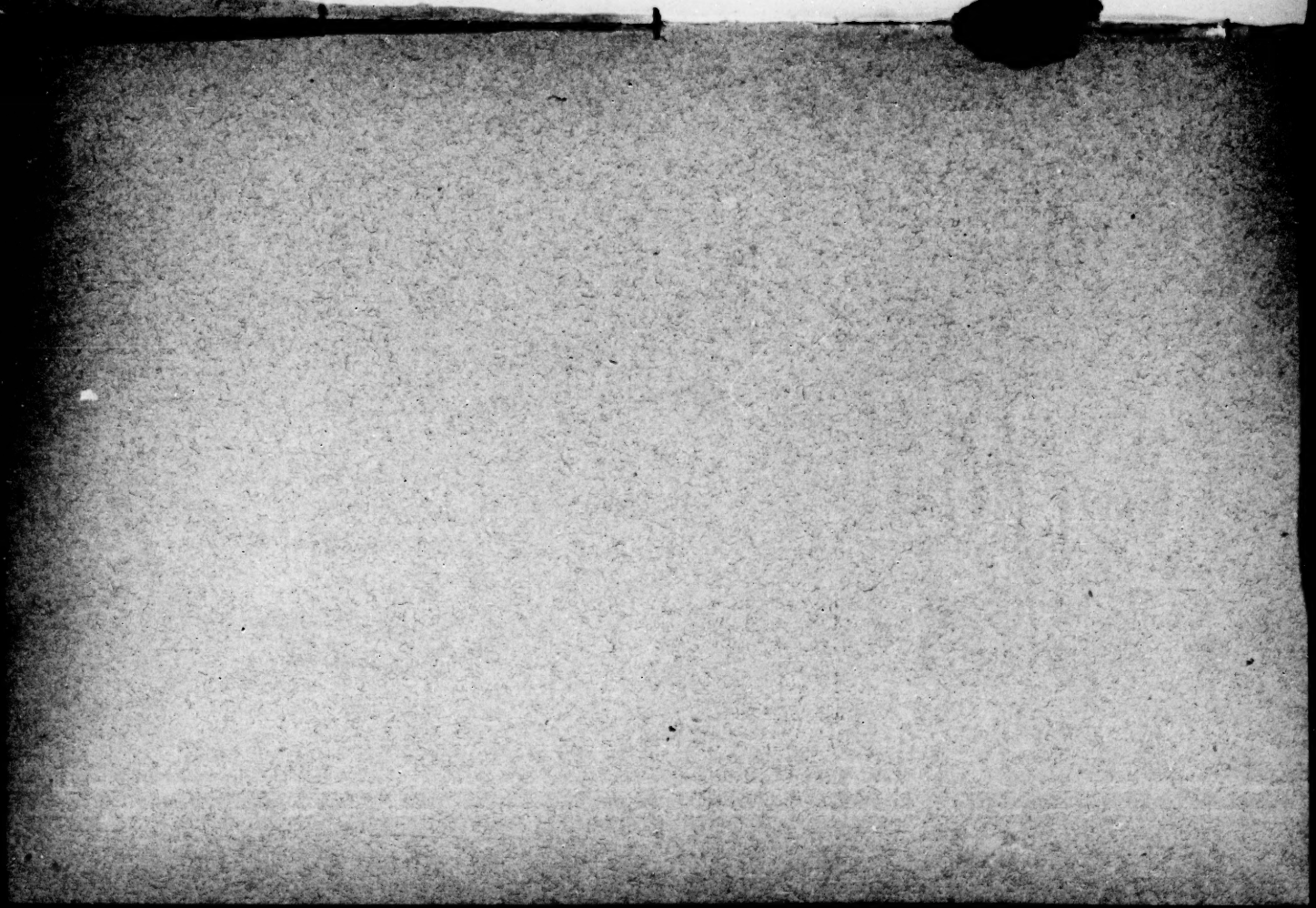
} No. 275.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.



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BRIEF OF ARGUMENT FOR DEFENDANT IN ERROR.

The plaintiffs claim that the merchandise imported by them should have been admitted free because it was imported from the Kingdom of Denmark; that by virtue of the treaty between the United States and Denmark merchandise imported from that Kingdom should not be subject to the imposition of any higher rate of duties than like articles imported from any other country; that as like merchandise, by virtue of the treaty made with the Hawaiian Islands, is admitted free, their merchandise should have been so admitted. The defendant denies that this ground is well taken. The clause of the treaty with

Denmark which bears on the question is found in the fourth article of the treaty ratified the 4th of May, 1826, and renewed by article 5 of the treaty ratified on the 12th of January, 1858 (Revised Statutes relating to treaties, &c., pages 168 and 174), and is as follows:

> No higher or other duties shall be imposed on the importation into the United States of any article the produce or manufacture of the dominions of His Majesty the King of Denmark—than are or shall be payable on the like article being the produce or manufacture of any other foreign country.

The treaty with the Kingdom of the Hawaiian Islands was ratified on the 3d of June, 1875, and is found in 19 U. S. Stats., page 625. The first article provides:

> For and in consideration of the rights and privileges granted by His Majesty the King of the Hawaiian Islands in the next succeeding article of this convention and as an equivalent therefor, the United States of America hereby agree to admit all the articles named in the following schedule, the same being the growth and manufacture or produce of the Hawaiian Islands, into all the ports of the United States free of duty.

The schedule includes "muscovado, brown, and all other unrefined sugar, meaning hereby the grades of sugar heretofore commonly imported from the Hawaiian Islands and now known in the markets of San Francisco and Portland as 'Sandwich Island sugar;' sirups of sugar-cane, melado, and molasses."

On the 22d of December, 1870 (Rev. Stat., p. 468), duties were imposed by an act of Congress on sugar, sirup, &c., such as are contained in the plaintiffs' invoices,

at the rates they were levied by the collector. This act was an amendment of the customs *Act of the 14th of July*, 1870 (16 Stats., 262). The act is of general application. No exception was made therein in favor of Denmark or other nations having special commercial treaties. It provides that the merchandise of Denmark and every other nation of the earth should pay the duties prescribed in it. It was later in date than the treaty with Denmark. If by treaty Denmark had any special privileges beyond the equality of right accorded as a rule to other nations of the earth, so far as those privileges were inconsistent with the law, it being a later enactment, to the extent of the inconsistency, it repealed the treaty. This principle is well stated by Miller, justice, in the case of the *Clinton Bridge* (Woolworth's Report, 155), as follows:

> In reference to the first of these objections, we need not inquire whether the treaties referred to were designed to affect such cases as the one before us or not; for we are of opinion that whatevor obligation they may have imposed upon our Government, the courts possess no power to declare a statute passed by Congress and approved by the President void, because it may violate such obligations.

In the case of the *Cherokee Tobacco* (11th Wallace, 616) it is ruled "an act of Congress may supersede a prior treaty."

A provision occurred in the treaty of 1832, with Russia, identical in language with that found in the Danish treaty.

The tariff act of 1842 imposed a duty of $40 per ton on all hemp except manila, sueva, and other hemps of India, on which a duty of $25 only was levied. In the case of

Taylor v. *Morton* (2 Curtis, 454) and *Ropes* v. *Clinch* (8 Blatchford, 304) suits were brought by importers from Russia to recover the difference between $25 per ton and $40; in both cases it was ruled the statute repealed the prior treaty. The treaty with the King of the Hawaiian Islands is, under the Constitution, a part of the law of the land, and is to be interpreted in the courts as any other law as to its effect. If, instead of being a treaty, it had been incorporated into the tariff act of 1870 as an exception to the general enactment that the Sandwich Islands sugar, sirup, &c., should be admitted free, such an exception would certainly not authorize the courts to add to that exception the Kingdom of Denmark together with about forty other nations with whom the United States had similar treaties. The United States in making the treaty with Hawaii never so intended. The intent of the law-makers is the law. The fact that the exception to the law was enacted at a later date than the original law would not justify giving the whole law and the exception so incorporated into it any different interpretation from what it would receive had the act and the exception been passed at the same time. That clause under consideration in the treaty with Denmark, when made, was only intended to provide that no adverse discrimination should be made against Denmark in the customs policy of the United States as compared with other nations, and it should not be construed to deprive the Government of the power to adjust and control the collection of its revenues, with the right to make special exceptions without by such exception destroying the whole effect of the law.

The case submitted does not come within the provisions

of the Danish treaty, for no higher or other duties were charged than are charged on the product of any other nation. Not only one, but many other nations are charged with the same duties. When the same privilege as "the most favored nation" are intended to be provided for, in a treaty, it is so stated. (*Vide* sixth article of treaty of 1800 with France, Revised Statutes, Treaties, &c., 226.)

G. A. JENKS,
Solicitor-General.